

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(i) Nature of Trusts and of the Trust Relationship/A. IN GENERAL/601. Meaning of 'trust'.

## **TRUSTS (VOLUME 48 (2007 REISSUE))**

### ***1. NATURE AND CREATION OF TRUSTS***

#### **(1) INTRODUCTION**

#### **(i) Nature of Trusts and of the Trust Relationship**

##### ***A. IN GENERAL***

##### **601. Meaning of 'trust'.**

Where a person has property or rights which he holds or is bound to exercise for or on behalf of another or others<sup>1</sup>, or for the accomplishment of some particular purpose or particular purposes<sup>2</sup>, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee<sup>3</sup>. A trust is a purely equitable obligation and is enforceable only in a court in which equity is administered<sup>4</sup>.

The trustee holds the property or must exercise his rights of property in a fiduciary capacity, and stands in a fiduciary relationship to the beneficiary<sup>5</sup>.

The property affected by a trust (the 'trust property' or 'trust estate') must be vested in the trustee<sup>6</sup>, whether the property is a legal estate, a legal right or an equitable interest where the legal title is vested in some other person<sup>7</sup>.

Different views have been expressed as to whether the right of a beneficiary is a right in rem or a right in personam<sup>8</sup>. It has been said in terms that the owner of an equitable estate has a right in rem and not merely a right in personam<sup>9</sup>. It has, however, been held that a claim for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as may be necessary to vest the legal ownership in the claimant does not constitute a claim in rem but a claim in personam<sup>10</sup>.

1 The persons on whose behalf the rights are to be exercised are called the cestuis que trust (*Beckford v Wade* (1805) 17 Ves 87 at 95, PC) or, more usually, the beneficiaries (see eg the Trustee Act 1925 ss 13(1), 62(1) (as amended); and PARAS 1044, 1131 post). A person may at the same time be a trustee and one of the beneficiaries: cf s 68(1) PARA (17); and note 3 infra. See also PARAS 754, 861 post. Exceptionally, in the case of a half secret trust (see PARA 677 post), the person taking as trustee on the face of a will cannot produce evidence allowing himself to take as beneficiary (ie evidence which contradicts the will and fails to comply with the terms of the Wills Act 1837 s 9 (as substituted) (see WILLS vol 50 (2005 Reissue) PARA 351 et seq)): *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA. It would be wrong, however, to say that if the legal estate is in A but the equitable interest in B, then A necessarily holds as trustee for B: there are many cases where B enjoys

rights which, in equity, are enforceable against the legal owner, A, without A being a trustee: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 706-707, [1996] 2 All ER 961 at 989, HL, per Lord Browne-Wilkinson; *Don King Productions Inc v Warren*[1998] 2 All ER 608 at 630, [1998] 2 Lloyd's Rep 176 at 192 per Lightman J (affd [2000] Ch 291, [1999] 2 All ER 218, CA). See also *R v Chester and North Wales Legal Aid Area Office (No 12), ex p Floods of Queensferry Ltd* [1998] 1 WLR 1496, [1998] BCC 685, CA.

2 Within the category of purpose trusts come trusts for charitable purposes: see CHARITIES vol 8 (2010) PARA 68 et seq. This category also includes trusts for such purposes as the maintenance of tombs and monuments or trusts relating to animals, so far as they are valid. As to such trusts see PARA 607 post.

3 This is an expansion of the definition of 'trust' given in Maitland's *Equity* p 44. A trust has also been defined as 'an equitable obligation, binding a person (called 'a trustee') to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or in old cases cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation': Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 2. The definition given in Underhill and Hayton *Law relating to Trusts and Trustees* (15th Edn, 1995) p 1 was approved in *Re Marshall's Will Trusts*[1945] Ch 217 at 219, [1945] 1 All ER 550 at 551 per Cohen J, and in *Green v Russel*[1959] 2 QB 226 at 241, [1959] 2 All ER 525 at 531, CA, per Romer LJ. Although this definition may be said to have been adequate for the purposes of those cases, it can be criticised as taking no account of purpose trusts: cf note 2 supra. As to the meaning of the trust relationship see further Co Litt 272b; 2 Bl Com (14th Edn) 337; *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 240 per Henley, Lord Keeper; *Dooby v Watson*(1888) 39 ChD 178 at 181-182 per Kekewich J; *Re Barney, Barney v Barney*[1892] 2 Ch 265 at 272 per Kekewich J; *Re Williams, Williams v Williams*[1897] 2 Ch 12 at 18-19, CA, per Lindley LJ.

In the Trustee Act 1925 and in the Trustee Investments Act 1961, 'trust' does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative; and 'trustee', where the context admits, includes a personal representative: Trustee Act 1925 s 68(1) PARA (17); Trustee Investments Act 1961 s 17(4). The Trustee Act 2000 applies in relation to a personal representative administering an estate as it applies to a trustee carrying out a trust for beneficiaries: see s 35(1), (2).

4 Co Litt 272b; Bacon's *Reading upon the Statute of Uses* 9; 3 Bl Com (14th Edn) 431-432; *Sturt v Mellish* (1743) 2 Atk 610 at 612 per Lord Hardwicke LC; *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 223 per Lord Mansfield CJ; *Re Williams, Williams v Williams*[1897] 2 Ch 12 at 19, CA, per Lindley LJ. See also EQUITY vol 16(2) (Reissue) PARAS 401 et seq, 496 et seq.

Conversely, in relation to conversion, the common law does not recognise the equitable title of the beneficiary under a trust but only recognises the title of the trustee, as the person normally entitled to immediate possession of the trust property; an equitable owner has no title at common law to sue in conversion, unless he can also show that he has actual possession or an immediate right to possession of the goods claimed: *MCC Proceeds Inc v Lehman Bros International (Europe)*[1998] 4 All ER 675, [1998] 2 BCLC 659, CA. The House of Lords has rejected as insupportable the proposition that 'a person who has the equitable ownership of goods is entitled to sue in tort for negligence anyone who for want of care causes them to be lost or damaged without joining the legal owner as a party to the action': *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd*[1986] AC 785 at 812, [1996] 2 All ER 145 at 151, HL, per Lord Brandon of Oakwood.

5 *Plowright v Lambert* (1885) 52 LT 646 at 652 per Field J. See also *Barnes v Addy*(1874) 9 Ch App 244 at 251 per Lord Selborne LC; *Re Barney, Barney v Barney*[1892] 2 Ch 265; *Mara v Browne*[1896] 1 Ch 199 at 209, CA, per AL Smith LJ; *Tito v Waddell (No 2)*[1977] Ch 106 at 238-243, [1977] 3 All ER 129 at 238-243 per Megarry V-C; and PARA 954 et seq post.

6 Exceptionally, settled land under the Settled Land Act 1925 is vested in the tenant for life and not the trustees of the settlement. The tenant for life is treated as a trustee to a limited extent: see the Settled Land Act 1925 s 107 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 775. Note that, with very limited exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARAS 606, 675 et seq.

The Trustee Act 2000 s 16 authorises trustees to appoint persons to act as their nominees and as custodians: see ss 16-26; and PARA 991 post. Trustees also have power to delegate and appoint agents: see PARA 988 et seq post.

7 *Head v Lord Teynham* (1783) 1 Cox Eq Cas 57; *Poole v Pass* (1839) 1 Beav 600; *Knight v Bowyer* (1857) 23 Beav 609 at 635 per Romilly MR.

8 See *Baker v Archer-Shee*[1927] AC 844, HL; *IRC v Berrill*[1982] 1 All ER 867, [1981] 1 WLR 1449. See also *Pritchard (Inspector of Taxes) v MH Builders (Wilmslow) Ltd*[1969] 2 All ER 670, [1969] 1 WLR 409; *Re Cuff*

*Knox, Barclays Bank Executor and Trustee Co (Channel Islands) Ltd v IRC*[1963] IR 263. Cf *Schalit v Joseph Nadler Ltd*[1933] 2 KB 79, DC. See also Maitland's *Equity* (2nd (Brunyate) Edn) p 106 et seq; (1917) 17 Col LR 269; Pettit *Equity and the Law of Trusts* (10th Edn, 2005) pp 81-83.

9 *Tinsley v Milligan*[1994] 1 AC 340 at 371, [1993] 3 All ER 65 at 86, HL, per Lord Browne-Wilkinson.

10 Case C-294/92 *Webb v Webb*[1994] QB 696, [1994] 3 All ER 911, ECJ; *Ashurst v Pollard*[2000] 2 All ER 772 (affd [2001] Ch 595, [2001] 2 All ER 75, CA).

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## **602. Personal representatives as trustees.**

In a loose sense a legal personal representative, while acting as such<sup>1</sup>, is a trustee for the creditors and beneficiaries claiming under the deceased, as he holds the real and personal estate of the deceased for their benefit and not for his own<sup>2</sup>. Moreover, in the Trustee Act 1925 'trustee', where the context so admits, includes a personal representative<sup>3</sup>; and on the death of a person intestate as to any real or personal estate that estate is held in trust by his personal representatives with the power to sell it<sup>4</sup>.

However, during the administration of the estate of the deceased, whether a testator<sup>5</sup> or an intestate<sup>6</sup>, no legatee, devisee or next of kin has any beneficial interest in the assets being administered; he has merely an equitable right to have the estate administered properly<sup>7</sup>. This right is enforced by means of devastavit proceedings<sup>8</sup>.

When the personal representatives realise that specific property left on trusts is not going to be resorted to in order to enable debts, expenses and liabilities to be satisfied, they may assent to that property being held on trust in the strict sense<sup>9</sup>. It is often important to determine when a personal representative has completed his functions as such in relation to any property and holds the property solely as a trustee in the strict sense<sup>10</sup>, as there are differences in the powers of personal representatives as such and trustees<sup>11</sup>, and the period of limitation applicable to a claim may depend in certain cases upon whether the defendant holds the property which is the subject of the claim as personal representative or as trustee<sup>12</sup>. Moreover, as the duty of personal representatives is owed to the estate as a whole, they, unlike trustees, do not have to hold the balance evenly between those interested in income and those interested in capital<sup>13</sup>.

1 In the Trustee Act 1925, 'personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person (s 68(1) PARA (9)); but in s 18 (devolution of powers and trusts: see PARA 817 post) 'personal representative' does not include an executor who has renounced or has not proved (s 18(4)).

2 *Re Hyatt, Bowles v Hyatt* (1888) 38 ChD 609 at 617; *Re Davis, Evans v Moore* [1891] 3 Ch 119 at 124, CA, per Lindley LJ; *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694 at 707, [1964] 3 All ER 692 at 696, PC. See also *Fordham v Wallis* (1853) 10 Hare 217 at 226; *Re Marsden, Bowden v Layland, Gibbs v Layland* (1884) 26 ChD 783 at 789-790; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 792. The special provisions relating to the limitation of actions in respect of trust property are, it seems, inapplicable to proceedings by a creditor: see LIMITATION PERIODS vol 68 (2008) PARA 1167.

3 See PARA 601 note 3 ante. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 5. As to the application of the Trustee Act 2000 to personal representatives see s 35; and PARA 601 note 3 ante.

4 See the Administration of Estates Act 1925 s 33 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 555. Where a testator fails to dispose effectively of some interest in property, the personal representative normally holds it, subject to his rights and powers for purposes of administration, in trust for the persons entitled on an intestacy: see s 49(1)(b) (renumbered by the Intestates' Estates Act 1952 ss 3, 4; and set out in amended form in Sch 1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 586, 615.

5 *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694, [1964] 3 All ER 692, PC.

6 *Eastbourne Mutual Building Society v Hastings Corpn* [1965] 1 All ER 779, [1965] 1 WLR 861.

7 *Re Hayes's Will Trusts, Pattinson v Hayes* [1971] 2 All ER 341 at 347, [1971] 1 WLR 758 at 764; and see *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694, [1964] 3 All ER 692, PC; *Lall v Lall* [1965] 3 All ER 330, [1965] 1 WLR 1249; *Re Leigh's Will Trusts, Handyside v Durbridge* [1970] Ch 277, [1969] 3 All ER 432; *Kavanagh v Best* [1971] NI 89 at 93-94; *Crowden v Aldridge* [1993] 3 All ER 603, [1993] 1 WLR 433; *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148, [1994] 3 All ER 106, HL. See also *Re K* [1986] Ch 180, [1985] 2 All ER 833, CA.

8 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 792 et seq.

9 *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522; *Re Edwards' Will Trusts, Edwards v Edwards* [1982] Ch 30 at 40, [1981] 2 All ER 941 at 949, CA, per Buckley LJ. See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 559 et seq. To ensure proper devolution of the legal title to land, personal representatives, on becoming trustees of the land, should execute a written assent in their own favour: *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833; not followed in *Mohan v Roche* [1991] 1 IR 560 (Irish case).

10 As to the time of the transition from personal representative to trustee see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 569-570.

11 Eg one of several personal representatives, but not one of several trustees, has power to pledge property forming part of a deceased person's estate (*George Attenborough & Son v Solomon* [1913] AC 76, HL); and a personal representative, but not a trustee, has the power of appropriation under the Administration of Estates Act 1925 s 41 (as amended) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 573 et seq). In the case of a policy taken out under Married Women's Property Act 1882 s 11, the personal representatives of the deceased hold the policy as trustees and not as personal representatives: see s 11; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 276. A person named as executor will, therefore, hold as trustee unless and until he has renounced the executorship and disclaimed the trusteeship: see *Rooney v Cardona* [1999] 1 WLR 1388, [1999] 2 FLR 1148, CA. As to the effect of the personal representative becoming a trustee generally see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 570. A personal representative who has fully administered the estate and holds the residue as trustee is not thereby necessarily discharged from his obligations as personal representative: see *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 568.

12 See the Limitation Act 1980 ss 21(3), 22; and LIMITATION PERIODS vol 68 (2008) PARAS 1143-1144, 1161. Since the coming into operation of the Limitation Act 1939 it no longer makes any difference for the purposes of the limitation of actions whether a trust is an express trust or not: see LIMITATION PERIODS vol 68 (2008) PARAS 1140, 1149-1152. See also *Cattley v Pollard* [2006] EWHC 3130 (Ch), [2007] WTLR 245, [2006] All ER (D) 106 (Dec).

13 *Re Hayes's Will Trusts, Pattinson v Hayes* [1971] 2 All ER 341, [1971] 1 WLR 758. See also *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379, CA.

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### 603. Legislation relating to trusts.

The principal statute relating to trusts is the Trustee Act 1925<sup>1</sup>. The powers conferred by that Act on trustees<sup>2</sup> are in addition to the powers conferred by the instrument, if any, creating the trust<sup>3</sup>, but, unless otherwise stated, those powers apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust<sup>4</sup>, and have effect subject to the terms of that instrument<sup>5</sup>.

Other statutes of great importance relating to trusts are the Variation of Trusts Act 1958<sup>6</sup>, the Trustee Investments Act 1961<sup>7</sup>, the Trusts of Land and Appointment of Trustees Act 1996<sup>8</sup> and the Trustee Act 2000<sup>9</sup>. The Law of Property Act 1925<sup>10</sup>, the Administration of Estates Act 1925<sup>11</sup>, the Settled Land Act 1925<sup>12</sup> and the Trustee Delegation Act 1999<sup>13</sup> also to a greater or lesser extent affect the law relating to trusts.

Certain trusts contained in instruments taking effect before 16 December 1952 which would otherwise have failed because the trust property was not exclusively applicable to charitable purposes have been validated by statute<sup>14</sup>. Certain occupational pension schemes are exempted by statute from the application of the rule against perpetuities<sup>15</sup>; and certain accumulations for the reduction of the National Debt have been validated by statute<sup>16</sup>.

The office of Public Trustee has been established, and his powers and duties regulated, by statute<sup>17</sup>; and the court has been empowered by statute to appoint judicial trustees in certain cases<sup>18</sup>.

Transactions at an undervalue and transactions defrauding creditors are governed by the Insolvency Act 1986<sup>19</sup>.

1 The Trustee Act 1925 came into force on 1 January 1926 (see s 71(1), (2) (s 71(2) repealed)) and did not affect the legality or validity of anything previously done, except so far as the Act expressly provided and except that certain retrospective amendments were made to earlier Acts (see s 69(3), Sch 1 (repealed)). The Trustee Act 1925 applies, except where otherwise expressly provided, to trusts including, so far as that Act applies to them, executorships and administratorships constituted or created either before or after the commencement of that Act: s 69(1). Except where otherwise expressly provided, the Trustee Act 1925 extends to England and Wales only: s 71(3). The provisions of the Trustee Act 1925 bind the Crown: s 71(4).

2 For the meaning of 'trustee' see PARA 601 ante.

3 For the meaning of 'trust' see PARA 601 ante.

4 For cases where a contrary intention was shown see *Re Turner's Will Trusts*, *District Bank Ltd v Turner* [1937] Ch 15, [1936] 2 All ER 1435, CA; *Re Rider's Will Trusts*, *Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974; *IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320, CA; *Re Evans' Settlement*, *Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294; *Re Erskine's Settlement Trusts*, *Hollis v Pigott* [1971] 1 All ER 572, [1971] 1 WLR 162. For cases where no contrary intention was held to have been shown see *Re Warren*, *Public Trustee v Fletcher* [1939] Ch 684, [1939] 2 All ER 599; *Re Rees*, *Lloyds Bank Ltd v Rees* [1954] Ch 202, sub nom *Re Rees' Will Trusts*, *Lloyds Bank Ltd v Rees* [1954] 1 All ER 7.

5 Trustee Act 1925 s 69(2). 'Trust instrument' means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments and a settlement or instrument which is deemed to be a trust instrument: Settled Land Act 1925 s 117(1)(xxxi) (definition applied by virtue of the Trustee Act 1925 s 68(1) PARA (15)). See SETTLEMENTS vol 42 (Reissue) PARA 688 et seq.

6 See PARA 1062 et seq post.

7 Except in so far as they are applied by or under any other enactment, the provisions of the Trustee Investments Act 1961 are largely repealed by the Trustee Act 2000 s 40(1), (3), Sch 2 para 1, Sch 4 Pt I. As to the Trustee Act 2000 see note 9 infra. As to the Trustee Investments Act 1961 see PARA 1017 et seq post; and as to the investment provisions of the Trustee Act 2000 see further PARA 1012 et seq post.

8 See eg paras 845 et seq, 1035 et seq post. See also REAL PROPERTY; SETTLEMENTS.

9 The Trustee Act 2000 ss 41-43 (power to amend other Acts, commencement, extent and short title) came into force upon Royal Assent on 23 November 2000. The remaining provisions came into force on 1 February 2001: see the Trustee Act 2000 (Commencement) Order 2001, SI 2001/49.

The Trustee Act 2000 extends to England and Wales only (s 42(4)), although an amendment or repeal in Sch 2 paras 3-57 (as amended; prospectively amended) or Sch 4 Pt II has the same extent as the provision amended or repealed (s 42(5)).

A Minister of the Crown may by order make such amendments of any Act, including an Act extending to places outside England and Wales, as appear to him appropriate in consequence of or in connection with Pt II (ss 3-7) (investment: see PARA 1012 et seq post) or Pt III (ss 8-10) (acquisition of land: see PARA 1034 post): s 41(1). Before exercising this power in relation to a local, personal or private Act, the minister must consult any person who appears to him to be affected by any proposed amendment: s 41(2). Such an order may contain such transitional provisions as the minister thinks fit, and may make different provision for different purposes: s 41(3). The power to make an order under s 41 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 41(4). 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 363): Trustee Act 2000 s 41(5). At the date at which this volume states the law no such order had been made.

10 See the Law of Property Act 1925 s 27 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 906. See also s 175; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 502.

11 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 335, 604.

12 See SETTLEMENTS vol 42 (Reissue) PARA 675 et seq.

13 See PARAS 848, 985 post.

14 See the Charitable Trusts (Validation) Act 1954; and CHARITIES vol 8 (2010) PARAS 97-102.

15 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1044.

16 See PARA 686 post; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1139.

17 See the Public Trustee Act 1906; the Public Trustee (General Deposit Fund) Act 1939; the Public Trustee (Fees) Act 1957; the Public Trustee and Administration of Funds Act 1986; and PARA 766 et seq post. See also the Administration of Estates Act 1925 s 9 (as substituted); para 767 note 4; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

18 See the Judicial Trustees Act 1896; and PARA 757 et seq post.

19 See PARA 680 post. As to transactions at an undervalue see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq; and as to transactions defrauding creditors see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 663 et seq.

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## **B. ESSENTIALS OF A VALID TRUST**

### **604. Trust intentionally created.**

A trust may be created intentionally<sup>1</sup> inter vivos or by will. Essentials of such creation are:

- 1 (1) property or rights capable of being subjected to the trust<sup>2</sup>;
- 2 (2) a declaration of, or disposition on, trust by a person competent to create a trust<sup>3</sup>, or an obligation for valuable consideration to create a trust<sup>4</sup>;
- 3 (3) certainty of property and objects so that the trust is administratively workable<sup>5</sup>; and
- 4 (4) compliance with the statutory requirements regarding evidence<sup>6</sup> and the rule against remoteness preventing interests vesting outside the perpetuity period and the rule against perpetual trusts preventing income from being inalienable for longer than the perpetuity period<sup>7</sup>.

A trust is void if it is created for an illegal purpose or is otherwise contrary to public policy<sup>8</sup>. Once everything necessary to create a trust has been done, equity will not allow a trust to fail for want of a trustee<sup>9</sup>.

1 Such trusts are express trusts, although express trusts may also be created by statute: see PARA 624 post. Constructive trusts may arise without being intentionally created: see PARA 625 post.

2 See PARA 605 post.

3 As to the persons capable of creating a trust see PARA 606 post.

4 As to the position where there is a voluntary covenant to create a trust see the Contracts (Rights of Third Parties) Act 1999; and PARAS 623, 661-662 post.

5 Except for a limited anomalous class of trusts such as those for animals and monuments (see PARA 607 post), this means that a trust must be directly or indirectly for the benefit of persons (individual or corporate) so that some person has locus standi to enforce the trust, unless the trust is for charitable purposes in which case the Attorney General has locus standi to enforce the purposes: see *Re Denley's Trust Deed*, *Holman v HH Martyn & Co Ltd*[1969] 1 Ch 373, [1968] 3 All ER 65; and PARA 631 post.

As to the constitution of an express trust see further PARAS 649 et seq post (certainty of intention), 653-654 post (certainty of subject matter), 655 et seq post (certainty of objects), 659 et seq post (need for complete disposition or contract for valuable consideration).

6 As to the requirement of writing see PARA 644 post.

7 See PARA 684 post. Exceptionally, charities are not subject to the rule against perpetual trusts, and property may pass from one charity to another outside the perpetuity period: see CHARITIES vol 8 (2010) PARA 140.

8 See PARA 678 post.

9 *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81. See also *A-G v Lady Downing* (1767) Wilm 1; *Ellison v Ellison* (1802) 6 Ves 656; *Mallott v Wilson*[1903] 2 Ch 494; *Re Armitage*, *Ellam v Norwich Corp'n*[1972] Ch 438,



[1972] 1 All ER 708. See also PARAS 659, 662 post. As to the constitution of disclaimed trusts inter vivos see Matthews 'The constitution of disclaimed trusts inter vivos' [1981] Conv 141.

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## 605. Property affected.

Any property or interest in property which a person can, at law or in equity, transfer or assign, or dispose of inter vivos or by a testamentary instrument, can be affected by him with a trust by an instrument inter vivos or by a testamentary instrument<sup>1</sup>. The scope of trusts recognised in equity is virtually unlimited. There can be a trust of a chattel or of a thing in action or of a right or obligation under an ordinary legal contract, just as much as a trust of land or money<sup>2</sup>. It even seems that a party to a contract involving skill and confidence or containing non-assignment provisions may become trustee of the benefit of being a contracting party as well as of the benefit of the rights conferred<sup>3</sup>.

As the only legal estates which can now subsist in land are an estate in fee simple in possession and a term of years absolute<sup>4</sup>, successive interests in land, other than by way of leases, can only take effect by means of a trust of land<sup>5</sup>. A trust is the usual method of creating successive interests in personal property<sup>6</sup>, and is essential for the creation of successive interests in personal property inter vivos<sup>7</sup>.

1 As to the inalienability of real property granted by the Crown or Parliament as a reward for distinguished public services see GIFTS vol 52 (2009) PARA 222. Chattels, or an interest in chattels, may in some cases be disposed of in equity when not assignable at law: *Joseph v Lyons* (1884) 15 QBD 280 at 284, CA, per Brett MR; *Hallas v Robinson* (1885) 15 QBD 288 at 292, CA, per Baggallay LJ (assignments of chattels to be acquired in future conferred only equitable interests upon grantees; interests of grantees postponed to legal rights in chattels conferred for value and without notice after acquisition of chattels by assignor). See also PERSONAL PROPERTY vol 35 (Reissue) PARAS 1265-1266. As to trusts of policies effected under the Married Women's Property Act 1882 s 11 (as amended) see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 274-276; as to trusts of heirlooms and other chattels settled with realty see SETTLEMENTS vol 42 (Reissue) PARA 937 et seq; and as to trusts relating to foreign immovables see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396.

For the purposes of the Trustee Act 1925, 'property' includes real and personal property, and any estate share and interest in any property, real or personal, and any debt and any thing in action, and any other right or interest whether in possession or not: s 68(1) PARA (11). 'Rights' includes estates and interest: s 68(1) PARA (12). As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

2 See *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 at 124 per Lord Shaw, cited in *Don King Productions Inc v Warren* [1998] 2 All ER 608, [1998] 2 Lloyd's Rep 176 (affd [2000] Ch 291, [1999] 2 All ER 218, CA). In *Abrahams v Trustee in Bankruptcy of Abrahams* [2000] WTLR 593, (1999) Times, 26 July, it was held that where a person paid money to a lottery syndicate she gained the right to have any winnings received duly administered in accordance with whatever rules of the syndicate then applied; and that right was property which was capable of being held on a resulting trust. In *Swift v Dairywise Farms Ltd* [2000] 1 All ER 320, [2000] 1 WLR 1177 (affd on other grounds [2001] EWCA Civ 145, [2003] 2 All ER 304n) it was held that a milk quota, which must be attached to a holding of appropriate land (a 'euroholding'), could be the subject of a trust; if T held a quota on trust for B, then, where B had no euroholding, he could not require T to transfer the quota to him, but he could require T to realise the quota and transfer the proceeds to him.

3 *Don King Productions Inc v Warren* [1998] 2 All ER 608 at 634, [1998] 2 Lloyd's Rep 176 at 195 per Lightman J; affd [2000] Ch 291, [1999] 2 All ER 218, CA. However, a provision in the contract prohibiting a party from declaring himself a trustee would be effective.

4 See REAL PROPERTY vol 39(2) (Reissue) PARA 45.

5 See REAL PROPERTY vol 39(2) (Reissue) PARA 66 et seq. Before the Trusts of Land and Appointment of Trustees Act 1996 came into force on 1 January 1997, such a disposition took effect either as a settlement under the Settled Land Act 1925 or a settlement on trust for sale under the Law of Property Act 1925. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925 (see the

Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante); and a trust for sale of land is now subsumed under a trust of land (see ss 1, 4, 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 66). See also PARA 724 post. See further SETTLEMENTS vol 42 (Reissue) PARAS 609, 675, 897. 'Trust of land' means any trust of property which consists of or includes land (s 1(1)(a)); and the reference to a trust is to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and includes a trust created or arising before the commencement of the Trusts of Land and Appointment of Trustees Act 1996 (s 1(2)). The reference to land in s 1(1)(a) does not include land which (despite s 1(2)) is settled land or which is land to which the Universities and College Estates Act 1925 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1379) applies: Trusts of Land and Appointment of Trustees Act 1996 s 1(3). For the purposes of the Trustee Act 1925, 'land' includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land: s 68(1) PARA (6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). For these purposes, 'mines and minerals' includes any strata or seam of minerals or substances in or under any land, and powers of working and getting the same; and 'hereditaments' means real property which under an intestacy occurring before 1 January 1926 might have devolved on an heir: Trustee Act 1925 s 68(1) PARA (6) (as so amended).

6 As to settlements of personalty generally see SETTLEMENTS vol 42 (Reissue) PARA 907 et seq.

7 See EQUITY vol 16(2) (Reissue) PARA 608; GIFTS vol 52 (2009) PARA 224; SETTLEMENTS vol 42 (Reissue) PARA 611. As to the creation of successive interests in personal property by will see PERSONAL PROPERTY vol 35 (Reissue) PARA 1230; WILLS vol 50 (2005 Reissue) PARA 412. It is no longer possible to create an entailed interest in either real or personal property: see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARA 105; SETTLEMENTS vol 42 (Reissue) PARA 677.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(i) Nature of Trusts and of the Trust Relationship/B. ESSENTIALS OF A VALID TRUST/606. Creator of trust.

## **606. Creator of trust.**

Any person or corporation<sup>1</sup> capable at law or in equity of alienating to any extent property or an interest in property, either inter vivos or, in the case of an individual, by a testamentary instrument, is to the same extent capable of creating a trust in that property or interest, or of disposing of it in trust, either inter vivos or, in the case of an individual, by a testamentary instrument<sup>2</sup>.

1 A distinction exists between non-statutory corporations which in general can do everything that an ordinary individual can do, unless restricted directly or indirectly by statute, and statutory corporations which can do only such acts as are authorised directly or indirectly by the statutes creating them: see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1223, 1230-1231. As to the power of alienation of corporations generally see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1255 et seq.

2 *Rycroft v Christy* (1840) 3 Beav 238; *Knight v Bowyer* (1857) 23 Beav 609 at 635 per Romilly MR; *Gilbert v Overton* (1864) 2 Hem & M 110. The person enabled by law to declare a trust of property is the beneficial owner of it: *Tierney v Wood* (1854) 19 Beav 330 at 335-336 per Romilly MR.

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## **607. Persons and objects in whose favour trusts may be created.**

A trust may be created in favour of any person to whom a gift can legally be made<sup>1</sup>. A trust may also be created for charitable purposes<sup>2</sup> but not in general for a non-charitable purpose or object or a non-human beneficiary such as a dog<sup>3</sup>. Exceptionally, however, certain trusts have been held valid, even though they were not charitable and there was no person who directly benefited from their performance<sup>4</sup>. Thus trusts for the building or maintenance of monuments or tombs not forming part<sup>5</sup> of a church have been held valid<sup>6</sup>, as have trusts for the maintenance of particular animals<sup>7</sup>. It seems, however, that in general equity will refuse to recognise a trust, other than a charitable trust, unless it is for the benefit of ascertained or ascertainable beneficiaries, and can be enforced by the court, and that the decisions by which trusts for the building or maintenance of tombs or trusts relating to animals have been held valid are to be regarded as anomalous and exceptional and their scope is not to be extended<sup>8</sup>. These anomalous trusts, which are known as 'unenforceable trusts' or 'trusts of imperfect obligation', seem to be restricted to trusts arising under wills where the legacy will fall into a residuary gift if the unenforceable trust is not carried out<sup>9</sup>. Such a trust, though valid, is unenforceable in that no one can compel the trustee to carry it out. If, however, he wishes to perform it, no one can prevent him from doing so and only if and so far as he chooses not to do so will there be a trust for the residuary legatees. Further, in order to be valid a non-charitable purpose trust must satisfy the rule against perpetual trusts<sup>10</sup> which requires that such a trust must not last beyond the perpetuity period<sup>11</sup>.

Where a trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, the trust can be valid provided those individuals are ascertainable at any one time and the trust is not otherwise void for uncertainty<sup>12</sup>.

Unincorporated associations, such as most clubs and societies, are not legal persons capable of having interests in property, and therefore there cannot be a trust for an unincorporated association as such<sup>13</sup>. It may, however, be possible to construe a gift to an unincorporated association as one to the members of the association in such a way that the gift is valid. The possible constructions and their effect are discussed elsewhere in this work<sup>14</sup>. If the trust is expressed to be for the purposes of a particular unincorporated association, then, so long as such purposes are not abstract or impersonal<sup>15</sup> (for example, the abolition of vivisection<sup>16</sup> or the furtherance of the views of a political party<sup>17</sup>) but are directly or indirectly for the benefit of persons intended to have locus standi to enforce the trust<sup>18</sup>, the trust may be valid if complying with the rule against remoteness and the rule against perpetual trusts.

The court may declare a trust void on the ground that its purposes are useless<sup>19</sup>.

1 See 8 Bac Abr 251, Uses and Trusts, Trusts (A); *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 195. See further GIFTS.

2 As to the meaning of 'charitable purposes' see CHARITIES vol 8 (2010) PARA 2; and as to the creation of charitable trusts see CHARITIES vol 8 (2010) PARA 68 et seq. As to the exemption of charitable trusts from the necessity for precision in the declaration of objects see PARA 608 post; and CHARITIES vol 8 (2010) PARA 104 et seq. As to the application to charitable trusts of the law which restricts the creation of perpetuities see PARA 684 post; and CHARITIES vol 8 (2010) PARA 140 et seq; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1055. As to the enforcement of charitable trusts see PARA 631 post; and CHARITIES vol 8 (2010) PARA 508. As to the validation

of certain instruments providing for property to be held for objects partly but not exclusively charitable see CHARITIES vol 8 (2010) PARA 97 et seq.

3 *Morice v Bishop of Durham* (1804) 9 Ves 399 (affd (1805) 10 Ves 522); *Bowman v Secular Society Ltd* [1917] AC 406, HL; *Re Wood, Barton v Chilcott* [1949] Ch 498, [1949] 1 All ER 1100; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA; *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401.

4 See eg *Gott v Nairne* (1876) 3 ChD 278 (trust to buy advowson and present fit person to benefice); *Re Thompson, Public Trustee v Lloyd* [1934] Ch 342 (trust for the furthering of fox-hunting; in this case, following *Pettingall v Pettingall* (1842) 11 LJ Ch 176, liberty was given to the residuary legatees to apply in case the trust was not carried out). An advowson may be held in trust for the inhabitants of a parish: see ECCLESIASTICAL LAW. As to gifts for the benefit of fluctuating bodies of persons see CHARITIES vol 8 (2010) PARA 60.

5 Trusts for the repair of monuments in churches are charitable: see CHARITIES vol 8 (2010) PARA 34.

6 *Trimmer v Danby* (1856) 25 LJ Ch 424; *Pirbright v Salwey* [1896] WN 86; *Re Hooper, Parker v Ward* [1932] 1 Ch 38.

7 *Pettingall v Pettingall* (1842) 11 LJ Ch 176; *Mitford v Reynolds* (1848) 16 Sim 105; *Re Dean, Cooper-Dean v Stevens* (1889) 41 ChD 552; *Re Haines, Johnson v Haines* (1952) Times, 7 November. As to the application of the law relating to perpetuities in connection with such trusts see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1005, 1014. A trust for the protection of animals generally is normally charitable: see CHARITIES vol 8 (2010) PARA 44.

8 See *Bowman v Secular Society Ltd* [1917] AC 406 at 441, HL; *Re Diplock, Wintle v Diplock* [1941] Ch 253 at 259, [1941] 1 All ER 193 at 198, CA (affd sub nom *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL); *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534 at 540-547, [1952] 1 All ER 1067 at 1070-1074; *Re Shaw, Public Trustee v Day* [1957] 1 All ER 745, [1957] 1 WLR 729 (compromised on appeal [1958] 1 All ER 245n, CA); *Leahy v A-G for New South Wales* [1959] AC 457 at 484, [1959] 2 All ER 300 at 310-311, PC; *Re Endacott, Corpe v Endacott* [1960] Ch 232 at 245-246, [1959] 3 All ER 562 at 567-568, CA. In *Re Astor's Settlement Trusts, Astor v Scholfield* supra there was no person entitled, subject to the trust, to the trust fund through whom the court could have indirectly enforced the trust (cf *Re Thompson, Public Trustee v Lloyd* [1934] Ch 342; and note 4 supra), and the absence of any such person was treated by the court as important in determining that the trusts were invalid; but in *Re Shaw, Public Trustee v Day* supra the existence of such persons was held not to enable the court to hold the trusts to be valid. As to the necessity for certainty in the objects of a trust see PARA 655 et seq post.

9 *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067. See WILLS vol 50 (2005 Reissue) PARA 410.

10 This is the rule referred to as the rule against perpetuities in eg *Chamberlayne v Brockett* (1872) 8 Ch App 206 at 211; *A-G v Webster* (1875) LR 20 Eq 483 at 491; *Income Tax Special Purposes Comrs v Pemsell* [1891] AC 531 at 581-582, HL. This is the terminology preferred in Morris and Leach's *Rule against Perpetuities* (2nd Edn) p 326, notwithstanding that this has the effect that the same term is used in two senses. It has also been referred to as the rule against inalienability: *Re Chardon, Johnston v Davies* [1928] Ch 464; *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v Fielding-Ould* [1950] Ch 260, [1950] 1 All ER 689. Maudsley's *Modern Law of Perpetuities* p 171 prefers to call it the rule against indefinite duration, saying that the objection is that the income of the fund is to be applied for a non-charitable purpose for an excessive period of time, but no specific item of property is inalienable. It is to be distinguished from the rule against remoteness of vesting, commonly known as the rule against perpetuities (see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1001 et seq). The rule against perpetual trusts has not been affected by the Perpetuities and Accumulations Act 1964: see s 15(4); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005. See also *Carne v Long* (1860) 2 De GF & J 75; *Re Macaulay's Estate, Macaulay v O'Donnell* [1943] Ch 435n, HL.

11 In the period of a life or lives in being and 21 years and a possible period for gestation after: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1008 et seq. The 'wait and see' provisions of the Perpetuities and Accumulations Act 1964 do not apply: see s 15(4). For the view that the 80-year period allowed by s 1 may be specified see Maudsley's *Modern Law of Perpetuities* p 178.

12 *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65.

13 As to unincorporated associations as employers see *Affleck v Newcastle Mind* [1999] ICR 852, [1999] IRLR 405, EAT.

14 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005.

15 *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC.

16 *National Anti-Vivisection Society v IRC* [1948] AC 31, [1947] 2 All ER 217, HL.

17 *Bacon v Pianta* (1966) 114 CLR 634, Aust HC; *Re Grant's Will Trusts* [1979] 3 All ER 359, [1980] 1 WLR 360.

18 *Re Denley's Trust Deed*, *Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Turkington* [1937] 4 All ER 501 (both cases applied in *Re Lipinski's Will Trusts*, *Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33). See also *Re Grant's Will Trusts* [1979] 3 All ER 359, [1980] 1 WLR 360; *Walker v Stones* [2001] QB 902, [2000] 4 All ER 412, CA.

19 *Brown v Burdett* (1882) 21 ChD 667 (a house devised upon trust to be practically closed up for 20 years held to have been undisposed of during that period).

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## **608. Uncertainty.**

The objects of a trust must be indicated with sufficient precision, for in order to be valid a trust must be one which the court can control and execute<sup>1</sup>. An exception exists in the case of trusts for charitable purposes, which will not be allowed to fail for want of precision in declaring the objects<sup>2</sup>; and by statute some trusts which otherwise would have failed because the trust property was not exclusively applicable for charitable purposes have been validated<sup>3</sup>.

1 See *Morice v Bishop of Durham* (1805) 10 Ves 522 at 539-540. See also *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; and PARAS 655-656 post.

2 See eg *Re Harpur's Will Trusts*, *Haller v A-G* [1962] Ch 78 at 91-92, [1961] 3 All ER 588 at 591-592, CA, per Lord Evershed MR; and CHARITIES vol 8 (2010) PARAS 89 et seq, 121-122.

3 See the Charitable Trusts (Validation) Act 1954; and CHARITIES vol 8 (2010) PARAS 97-102.



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## 609. Persons who may be trustees.

The appointment of a minor to be a trustee in relation to any settlement or trust is void, irrespective of the nature of the property to which the settlement or trust relates<sup>1</sup>, but it seems that he can hold property, other than a legal estate in land<sup>2</sup>, upon a resulting, implied or constructive trust<sup>3</sup>. Apart from this, any person who is capable in law of holding property in his own right may hold the office of trustee in respect of such property<sup>4</sup>. A corporation, whether aggregate or sole, may as a rule be a trustee<sup>5</sup>, and so may an alien<sup>6</sup>.

A person may hold a legal estate in property as trustee of that estate for himself and other beneficiaries<sup>7</sup>. He may not, however, at the same time be sole trustee and sole beneficiary of commensurate legal and equitable estates in property<sup>8</sup>, but he may be the legal owner of property and at the same time the equitable owner of a smaller equitable estate or interest in the same property where that smaller estate or interest does not in equity merge in the larger legal estate<sup>9</sup>.

1 Law of Property Act 1925 s 20. This is without prejudice to the power to appoint a new trustee to fill the vacancy: s 20. As to the appointment of new trustees see PARA 818 et seq post. Under the Trusts of Land and Appointment of Trustees 1996 s 2, Sch 1 para 1 (replacing the Law of Property Act 1925 s 19(4), (5) (repealed)), a conveyance of a legal estate to a minor on any trusts is ineffectual to pass any legal estate to him: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 31.

2 See the Law of Property Act 1925 s 1(6); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 25.

3 *Re Vinogradoff, Allen v Jackson* [1935] WN 68.

4 As to how far the Sovereign can be a trustee see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 844; and as to trustees of literary and scientific institutions see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARAS 945, 947. A local authority is not authorised to accept property which, when accepted, would be held in trust for an ecclesiastical charity or a charity for the relief of poverty: see the Local Government Act 1972 s 139(3); and LOCAL GOVERNMENT vol 69 (2009) PARA 528. There are statutory disqualifications in relation to charity trustees (see the Charities Act 1993 s 72 (as amended); and CHARITIES vol 8 (2010) PARA 273) and in relation to trustees of an occupational pension scheme established under a trust (see the Pensions Act 1995 ss 29, 30 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 788).

5 *Green v Rutherford* (1750) 1 Ves Sen 462; *A-G v Foundling Hospital Governors* (1793) 2 Ves 42 at 46, 50; *A-G v Aspinall* (1837) 2 My & Cr 613; *Assets Realisation Co v Trustees, Executors, and Securities Insurance Corpn* (1895) 65 LJ Ch 74; *Re Thompson's Settlement Trusts, Thompson v Alexander* [1905] 1 Ch 229; *Re Munster and Leinster Bank Ltd* [1907] 1 IR 237 at 244, 251. See also PARAS 793 et seq, 833, 864 post; and CHARITIES vol 8 (2010) PARA 254 et seq; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1246. Under the Bodies Corporate (Joint Tenancy) Act 1899 s 1, which empowers corporations to hold property as joint tenants, a corporate body can be a trustee jointly with other corporate bodies or with individuals: see *Re Thompson's Settlement Trusts, Thompson v Alexander* supra; *Re Munster and Leinster Bank Ltd* supra; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1246. As to the appointment of a corporation as a trustee by the court see PARA 864 post; as to trust corporations see PARA 798 et seq post; and as to the Public Trustee see PARA 766 et seq post.

6 See the Status of Aliens Act 1914 s 17 (as amended); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. An alien cannot, however, be the owner of a British ship (see the Status of Aliens Act 1914 s 17 proviso (3); the Merchant Shipping Act 1995 s 9(2)(a); the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138 (as amended); and SHIPPING AND MARITIME LAW); and certain persons only are qualified to hold a legal interest by way of ownership in an aircraft registered in the United Kingdom (see the Air Navigation Order 2005, SI 2005/1970, art 4(3); and AIR LAW vol 2 (2008) PARA 368). See also *Meinertzhagen v Davis* (1844) 1 Coll 335.

7 *Burges v Lamb* (1809) 16 Ves 174; *Ex p Clutton* (1853) 17 Jur 988; *Forster v Abraham* (1874) LR 17 Eq 351; *Re Courtier, Coles v Courtier, Courtier v Coles* (1886) 34 ChD 136, CA; *Head v Gould* [1898] 2 Ch 250 at 272. A tenant for life may also be a trustee of the settlement under the Settled Land Act 1925: *Re Jackson's Settled Estate* [1902] 1 Ch 258; *Re Davies and Kent's Contract* [1910] 2 Ch 35, CA; *Re Johnson's Settled Estates* [1913] WN 222; *Re Pennant's Will Trusts, Pennant v Rylands* [1970] Ch 75, [1969] 2 All ER 862. As to settled land trustees generally see SETTLEMENTS vol 42 (Reissue) PARA 750 et seq. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 post.

8 *Habergham v Vincent* (1793) 2 Ves 204 at 210 per Lord Loughborough LC; *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 126-127 per Arden MR; *Selby v Alston* (1797) 3 Ves 339 at 341; *Re Douglas, Wood v Douglas* (1884) 28 ChD 327 at 331 per Pearson J; *Fung Ping Shan v Tong Shun* [1918] AC 403, PC. See also *Goodright v Wells* (1781) 2 Doug KB 771 at 778 per Lord Mansfield CJ. Cf *Re Cook, Beck v Grant* [1948] Ch 212, [1948] 1 All ER 231. As to the position of equitable tenants in common of land who acquire the legal estate as joint tenants see REAL PROPERTY vol 39(2) (Reissue) PARA 257. As to merger generally see EQUITY vol 16(2) (Reissue) PARA 764 et seq; REAL PROPERTY vol 39(2) (Reissue) PARAS 255-256.

9 *Robinson v Cuming* (1739) 1 Atk 473; *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 126-127. An equitable estate tail does not merge in a legal fee simple: *Merest v James* (1821) 6 Madd 118.

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## **610. Persons who may be beneficiaries.**

Any person or corporation capable at law or in equity of taking and holding to any extent property or an interest in property either by a transaction operating inter vivos or by a testamentary disposition is to the same extent capable of taking and holding a beneficial interest as beneficiary under a trust of that property or interest<sup>1</sup>. Moreover, the interposition of a trustee enables trusts to be created in favour of persons not yet in existence and objects incapable of taking a benefit under a direct gift<sup>2</sup>.

1 As to the capacity of corporations see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1223, 1230 et seq (distinction between statutory and other corporations), 1247 et seq (ownership of property). A minor is incapable of holding a legal estate in land, but land may be held in trust for him: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30 et seq. Aliens can be beneficiaries under a trust of any property (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13) except a British ship (see the Status of Aliens Act 1914 s 17 (as amended); the Merchant Shipping Act 1995 s 9(2)(a); the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138 (as amended); and SHIPPING AND MARITIME LAW); and certain persons only are qualified to hold a legal interest by way of ownership in an aircraft registered in the United Kingdom (see the Air Navigation Order 2005, SI 2005/1970, art 4(3); and AIR LAW vol 2 (2008) PARA 368).

2 *Re Bowles, Amedroz v Bowles* [1902] 2 Ch 650.

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## (ii) Trusts contrasted with other Relationships

### 611. Distinction between power and trust.

In general the distinction between a power and a trust is that the court cannot compel the execution of a power but it may compel the execution of a trust<sup>1</sup>. Thus if property is held by trustees on trust for A for life, remainder to B, with power in A's lifetime to pay income or capital to X, then X cannot compel the exercise of that power. However, A can compel the trustees to pay him the income if they do not exercise the power in X's favour within a reasonable time of receiving the income<sup>2</sup>. A provision which in form creates only a power may, however, be construed as creating a power in the nature of a trust, for example where a power is conferred to appoint among certain objects but there is no gift over in default of appointment and there is a clear indication that the donor of the power intended that some or other of the objects should benefit<sup>3</sup>.

In the case of every trust for sale of land created by a disposition there is to be implied, despite any provision to the contrary made by the disposition, a power for the trustees to postpone sale of the land; and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period<sup>4</sup>.

1 See POWERS vol 36(2) (Reissue) PARAS 208, 286. See also PARA 632 et seq post.

2 *Re Allen-Mayrick's Will Trusts, Mangnall v Allen-Meyrick*[1966] 1 All ER 740, [1966] 1 WLR 499; cf *Re Locker's Settlement Trusts, Meachem v Sachs*[1978] 1 All ER 216, [1977] 1 WLR 1323, DC.

3 Eg where a testator has left his residuary estate to A for life and then for such of A's children in such shares as A may appoint, in which case the children may claim the property equally if A dies without having made any appointment: see *Burrough v Philcox* (1840) 5 My & Cr 72; *Re Weekes' Settlement*[1897] 1 Ch 289; and POWERS vol 36(2) (Reissue) PARA 209 et seq.

4 Trusts of Land and Appointment of Trustees Act 1996 s 4(1). This provision applies to a trust whether it is created, or arises, before or after 1 January 1997 (s 4(2)), but does not affect any liability incurred by trustees before that date (s 4(3)). The date referred to is the date of commencement of the Trusts of Land and Appointment of Trustees Act 1996: see s 27(2); and the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974. See further REAL PROPERTY vol 39(2) (Reissue) PARA 64. Trusts for sale of land are now subsumed under trusts of land: see PARA 605 note 5 ante. See also PARA 724 post.

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## **612. Trusts by imposition of condition.**

Where property is given to a person upon condition that he does a certain act or confers a certain benefit on another person, the condition may constitute a trust if it is directed to be, or must necessarily be, performed and satisfied out of the property, and consequently imposes a fiduciary obligation in respect of the property<sup>1</sup>; but it will not be construed as a trust if this is not the case and the condition merely imposes a collateral duty<sup>2</sup>. Similarly, a devise of land upon condition of paying a sum of money or an annuity does not create a trust, although it may create a charge<sup>3</sup>.

An obligation to do an act with respect to property may create a trust<sup>4</sup>.

1 *Wright v Wilkin* (1860) 2 B & S 232 at 259, Ex Ch; *Merchant Taylors' Co v A-G* (1871) 6 Ch App 512; *A-G v Wax Chandlers' Co* (1873) LR 6 HL 1; *Cunningham v Foot* (1878) 3 App Cas 974 at 995, HL, per Lord O'Hagan; *Re Kirk, Kirk v Kirk* (1882) 21 ChD 431 at 436, CA, per Fry J; *Re Richardson, Shuldham v Royal National Lifeboat Institution* (1887) 56 LJ Ch 784; *Re Richardson, Richardson v Richardson* [1904] 2 Ch 777 at 780 per Joyce J.

2 *Kingham v Lee* (1846) 15 Sim 396 (not to commit waste); *Re Richardson, Richardson v Richardson* [1904] 2 Ch 777 (to reside in the testatrix's house and provide there a home for a person mentally disordered if that person chose). Cf *Re Brace, Gurton v Clements* [1954] 2 All ER 354, [1954] 1 WLR 955 (where a house was devised to a daughter on condition that she 'provided a home' for another daughter, and it was held that there was no binding trust imposed on the devisee). A condition in a will that a legatee should adopt the testator's daughter was held, however, to constitute a trust to provide out of the legacy for the maintenance of the daughter as if she were the legatee's adopted daughter: *Re Frame, Edwards v Taylor* [1939] Ch 700, [1939] 2 All ER 865.

3 *Hodge v Churchward* (1847) 16 Sim 71; *Cunningham v Foot* (1878) 3 App Cas 974 at 990, 995, 1002, HL.

4 *Fleeming v Howden* (1868) LR 1 Sc & Div 372 at 383, HL, per Lord Westbury.

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### **613. Distinction between charge and trust.**

An express charge does not in itself amount to an express trust<sup>1</sup>, as it imposes merely a liability on the property charged whereas a trust imposes a fiduciary character on its owner<sup>2</sup>. A charge may, however, amount to a trust if it is coupled with other trusts or the context otherwise so requires<sup>3</sup>. Conversely, a provision containing the expression 'trust' may on its true construction amount merely to a charge<sup>4</sup>.

A person holding property subject to a charge is under no fiduciary duty to account for rents and profits arising from the property and, once the charge is satisfied, he holds the property absolutely and beneficially<sup>5</sup>.

1 *King v Denison* (1813) 1 Ves & B 260; *Messenger v Andrews* (1828) 4 Russ 478; *Harrison v Duignan* (1842) 2 Dr & War 295 at 304; *Hughes v Kelly* (1843) 3 Dr & War 482; *Francis v Grover* (1845) 5 Hare 39 at 49 et seq; *Charitable Donations and Bequests Comrs v Wybrants* (1845) 2 Jo & Lat 182; *Hodge v Churchward* (1847) 16 Sim 71; *Jacquet v Jacquet* (1859) 27 Beav 332; *Dickenson v Teasdale* (1862) 1 De GJ & Sm 52; *Williams v Arkle* (1875) LR 7 HL 606; *Re Hazlette* [1915] 1 IR 285. See also CHARITIES vol 8 (2010) PARA 135 et seq.

2 See *Cunningham v Foot* (1878) 3 App Cas 974 at 992-993, HL, per Lord O'Hagan (where it was a question whether there was an express trust for the purpose of taking the obligation out of the relevant limitation period).

3 *Ball v Harris* (1839) 4 My & Cr 264; *Charitable Donations and Bequests Comrs v Wybrants* (1845) 2 Jo & Lat 182; *Hunt v Bateman* (1848) 10 I Eq R 360; *Jacquet v Jacquet* (1859) 27 Beav 332; *Saltmarsh v Barrett* (1861) 3 De GF & J 279; *Barrs v Fewkes* (1864) 2 Hem & M 60 at 65 per Wood V-C. As to the creation of an equitable lien see LIEN vol 68 (2008) PARA 856. As to the creation of an equitable charge see *Swiss Bank Corp'n v Lloyds Bank Ltd* [1982] AC 584, [1981] 2 All ER 449, HL; and CHOSSES IN ACTION vol 13 (2009) PARA 28; MORTGAGE vol 77 (2010) PARA 106.

4 *Dawson v Clarke* (1811) 18 Ves 247 at 257 per Lord Eldon LC; *Barrs v Fewkes* (1864) 2 Hem & M 60 at 65-66.

5 *Re Oliver, Newbald v Beckitt* (1890) 62 LT 533.

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## **614. Trusts and restitution.**

Restitution has now been recognised as a part of English law<sup>1</sup>. It is, perhaps, most closely related to contract<sup>2</sup> and tort<sup>3</sup>, but there is an overlap with the law of trusts<sup>4</sup>.

1 See *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Equitable Building Society v IRC (No 2)* [1992] 3 All ER 737, HL; and RESTITUTION vol 40(1) (2007 Reissue) PARA 1 et seq.

2 See CONTRACT.

3 See TORT.

4 See eg *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL (where it was said that the resulting trust is an unsuitable basis for developing proprietary remedies: see at 716 and 999 per Lord Browne-Wilkinson); *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, [1998] 2 BCLC 185, CA; and see RESTITUTION.

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### **615. Distinction between governmental or public obligation and trust.**

Ministers of the Crown often administer property for the benefit of others in the exercise of the Crown's governmental functions. No trust arises in such a case<sup>1</sup>. If a person carrying out a public statutory duty is in breach of that duty, there is no remedy in breach of trust or equitable account<sup>2</sup>. There are, instead, the remedies of judicial review, declaration, injunction and recovery of money if wrongly demanded and paid<sup>3</sup>.

1 See *Kinloch v Secretary of State for India in Council* (1880) 15 ChD 1 (on appeal (1882) 7 App Cas 619, HL); *Tito v Waddell (No 2)* [1977] Ch 106 at 210-224, [1977] 3 All ER 129 at 216-228 per Megarry V-C; *Philipp Bros Ltd v Republic of Sierra Leone and EC Commission* [1995] 1 Lloyd's Rep 289, CA. See also *Grenville-Murray v Earl of Clarendon* (1869) LR 9 Eq 11.

2 *Swain v Law Society* [1983] 1 AC 598, [1982] 2 All ER 827, HL.

3 *Swain v Law Society* [1983] 1 AC 598 at 618, [1982] 2 All ER 827 at 838, HL, per Lord Brightman; *Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL. See also *Re West End Networks Ltd (in liquidation)*, *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24 at [27], [2004] 2 All ER 1042 at [27], [2004] BCLC 1 at [27] per Lord Hoffman. As to judicial review see JUDICIAL REVIEW; CIVIL PROCEDURE. As to injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to recovery of money wrongly demanded and paid see RESTITUTION.



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## **616. Relationship between mortgagor and mortgagee.**

Since the enactment of the Law of Property Act 1925, a mortgagee cannot be a trustee of mortgaged land as the land must remain vested in the mortgagor<sup>1</sup>. In exercising his statutory power of sale a mortgagee is under no fiduciary duty to sell the land as a trustee would sell it<sup>2</sup>. He may exercise the power for his own purposes whenever he chooses to do so, and may give preference to his own interests over those of the mortgagor<sup>3</sup>. He is under a duty recognised by equity, which he owes to the mortgagor, and to a guarantor of the mortgage<sup>4</sup>, to take reasonable care to obtain the market value of the land when he does proceed to a sale<sup>5</sup>.

If the exercise of the power of sale produces more than necessary for discharging the mortgagor's liability to the mortgagee, the mortgagee holds the surplus on trust for any subsequent mortgagees and the mortgagor<sup>6</sup>. Thus the first mortgagee pays the surplus to the second mortgagee, who holds the money on trust to pay himself and then transfer the balance to the person next entitled, who will be the mortgagor if there is no third mortgagee.

If a mortgagee takes possession of the mortgaged land, he is made liable to account, somewhat like a trustee, on a footing of wilful default, which means that he has to account not just for the benefits actually obtained from his possession but also for the benefits that could have been obtained if he had taken reasonable steps<sup>7</sup>.

In the case of an equitable mortgage of land it may well be that the mortgagee's statutory power of sale extends only to the equitable estate, and not the legal estate<sup>8</sup>. As a device to enable the mortgagee to deal with the legal estate a clause is often inserted in the mortgage deed by which the mortgagor expressly declares that he holds the legal estate on trust for the mortgagee and authorises the mortgagee to appoint himself or his nominee as trustee in place of the mortgagor<sup>9</sup>.

Where a mortgage takes effect by way of transfer of the property to the mortgagee, subject to a proviso for retransfer to the mortgagor on discharge of the mortgage debt, no trust relationship subsists<sup>10</sup> unless the mortgage instrument expressly declares a trust<sup>11</sup>. If a mortgagee has been fully paid off, until retransfer he holds the property on trust for the mortgagor<sup>12</sup>.

1 See the Law of Property Act 1925 ss 85, 86 (as amended); and MORTGAGE vol 77 (2010) PARA 187 et seq.

2 *Warner v Jacob* (1882) 20 ChD 220; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA. As to the power of sale see MORTGAGE vol 77 (2010) PARA 440 et seq.

3 'Unlike statutory powers conferred for the public benefit, or trustees' powers conferred for the benefit of beneficiaries . . . a mortgagee's powers are conferred upon him for his own benefit . . . The power of sale is improperly exercised if it is no part of the mortgagee's purpose to recover the debt secured by the mortgage. Where, however, a mortgagee has mixed motives (or purposes) one of which is a genuine purpose of recovering, in whole or in part, the amount secured by the mortgage, . . . the exercise of the power of sale will not be invalidated on that ground': *Meretz Investments v ACP Limited* [2006] EWHC 74 Ch at [314], [2006] 3 All ER 1029 at [314] per Lewison J.

4 *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA; *China and South Sea Bank Ltd v Tan Soon Gin (alias George Tan)* [1990] 1 AC 536, [1989] 3 All ER 839, PC; and see note 5 infra.

5 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA. It is not entirely clear whether the duty arises at common law or in equity. In *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 at 942, [1982] 1 WLR 1410 at 1415, CA, Lord Denning MR said that the duty is only a particular application of the general duty of care to one's neighbour which was stated by Lord Atkin in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL (see NEGLIGENCE vol 78 (2010) PARA 4). In *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, [1990] 2 All ER 577, CA, however, Nourse LJ said that it was both unnecessary and confusing for the duty to be expressed in terms of the tort of negligence. In his view the court in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* supra and the cases cited therein demonstrate that the duty is one recognised by equity as arising out of the particular relationship between mortgagor and mortgagee. The duty to take reasonable care to obtain market value does not include a duty to pursue planning applications in respect of it: *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 4 All ER 484, [2004] 1 WLR 997; applied in *Den Norske Bank ASA v Acemex Management Co Ltd* [2003] EWCA Civ 1559, [2004] 1 All ER (Comm) 904. See also *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC; *American Express International Banking Corp v Hurley* [1985] 3 All ER 564; *Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144, CA; *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, [1993] 3 All ER 626, PC; *Medforth v Blake* [2000] Ch 86, [1999] 3 All ER 97, CA; *Mortgage Express v Mardner* [2004] EWCA Civ 1859, [2004] All ER D 299 (Dec); *Bradford and Bingley plc v Ross* [2005] EWCA Civ 394, [2005] All ER (D) 210 (Mar); *Bishop v Blake* [2006] EWHC 831 (Ch), [2006] 17 EG 113 (CS). The creditor's failure to obtain the proper value of a security which he sells reduces pro tanto the amount for which the guarantor is liable: *Skipton Building Society v Stott* [2001] QB 261 at 269, [2000] 2 All ER 779 at 786, CA, per Evans LJ; applied in *Barclays Bank plc v Kingston* [2006] EWHC 533 (QB), [2006] 1 All ER (Comm) 519. See also MORTGAGE vol 77 (2010) PARA 458.

6 See the Law of Property Act 1925 s 105, seemingly codifying the position as exemplified by *Banner v Berridge* (1881) 18 ChD 254; and see MORTGAGE vol 77 (2010) PARA 472. See also *Re Thomson's Mortgage Trusts, Thomson v Bruty* [1920] 1 Ch 508.

7 See MORTGAGE vol 77 (2010) PARA 428. Thus where a brewery as mortgagee took possession of a public house mortgaged to it and leased it as a tied house, the brewery was held liable to account not for the rent actually received but for the rent it could have received if it had leased the public house as a free house: *White v City of London Brewery Co* (1889) 42 ChD 237, CA. However, unlike a trustee, the brewery did not have to account for the profits it received from sale of its products to the public house: *White v City of London Brewery Co* supra.

8 See *Re Hodson and Howes' Contract* (1887) 35 ChD 668; CA; cf *Re White Rose Cottage* [1965] Ch 940 at 951, [1965] 1 All ER 11 at 15, CA, per Lord Denning MR.

9 See MORTGAGE vol 77 (2010) PARA 134.

10 See *Kirkwood v Thompson* (1865) 2 De GJ & Sm 613; *London and County Banking Co v Goddard* [1897] 1 Ch 642 at 649-650.

11 Thus if shares are transferred to X by way of mortgage, X may use the voting rights as he likes unless under the mortgage instrument he has bound himself to vote as directed by the mortgagor: *Siemens Bros & Co Ltd v Burns* [1918] 2 Ch 324, CA.

12 *Teevan v Smith* (1882) 20 ChD 724 at 730, CA; *London and County Banking Co v Goddard* [1897] 1 Ch 642 at 650.

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## 617. Circumstances in which an agent is a trustee.

The existence of a contractual relationship does not constitute a trust<sup>1</sup>, and a contract of agency does not in itself make the agent a trustee<sup>2</sup>. Under a power of attorney or otherwise, an agent may, however, hold and deal with the property of his principal in such circumstances and in such a manner as to constitute him a trustee for his principal<sup>3</sup>.

An agent may become a constructive trustee. If, for instance, his principal directs him to buy Blackacre, and he purports to buy it for himself, he will be held to be a constructive trustee of it for his principal<sup>4</sup>. He will also be held to be a constructive trustee if his principal transfers property to him for sale, investment or safe custody<sup>5</sup>; and where he receives property on behalf of his principal, provided he is under a duty to keep it separate from his own property<sup>6</sup>.

1 *Ferguson v Wilson* (1866) 2 Ch App 77 at 87-88 per Turner LJ; *Wilson v Lord Bury* (1880) 5 QBD 518 at 530-531, CA; *Soar v Ashwell* [1893] 2 QB 390 at 393, CA, per Lord Esher MR.

2 *Lister & Co v Stubbs* (1890) 45 ChD 1, CA; *Piddocke v Burt* [1894] 1 Ch 343 at 346 per Chitty J; *Henry v Hammond* [1913] 2 KB 515; but see *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC (cited in PARA 618 note 4 post). See also AGENCY vol 1 (2008) PARAS 73, 76, 84. In the case of an agent employed under a contract, the scope of his fiduciary duties is determined by the terms of the underlying contract: see *Kelly v Cooper* [1993] AC 205, [1992] 3 WLR 936, PC (estate agent selling two adjacent properties; no duty to tell vendor that the same purchaser buying both properties; term implied into contract that estate agent could act for both properties and keep information confidential); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL.

3 *Henchman v East India Co* (1797) 8 Bro Parl Cas 85; *Foley v Hill* (1848) 2 HL Cas 28 at 35-36 per Lord Cottenham LC; *Burdick v Garrick* (1870) 5 Ch App 233 at 240 per Lord Hatherley LC; *Gray v Bateman* (1872) 21 WR 137; *North American Land and Timber Co Ltd v Watkins* [1904] 1 Ch 242 (affd [1904] 2 Ch 233, CA); *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555, PC; *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658; *Kingscroft Insurance Co Ltd v HS Weavers (Underwriting) Agencies Ltd* [1993] 1 Lloyd's Rep 187.

4 *Longfield Parish Council v Robson* (1913) 29 TLR 357.

5 See *Re Hallett's Estate* (1879) 13 ChD 696; *Burdick v Garrick* (1870) 5 Ch App 233.

6 *Lyell v Kennedy* (1889) 14 App Cas 437; *Foley v Hill* (1848) 2 HL Cas 28; *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676; *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA. As to bribes received by an agent see *A-G of Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC.

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## 618. Relationship between partners.

The relationship between partners is special enough for the partners to owe some fiduciary duties to each other, but they are not treated as strictly trustees<sup>1</sup>. It has been held that, if a partner is in breach of his fiduciary duties, he is merely under a personal liability to account to the partnership for a sum corresponding to money received in breach of those duties (for example, a bribe)<sup>2</sup>; but the main authority<sup>3</sup> for that proposition has now been doubted by the Privy Council<sup>4</sup> which has said that that authority is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that he should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. It follows that the bribe and the property from time to time representing it (and other property received in breach of his fiduciary duties) are held on constructive trust for the partnership<sup>5</sup>. On the dissolution of a partnership, or under the terms of a partnership agreement, a trust of partnership property may arise<sup>6</sup>. A legal estate in land vested in partners as part of their partnership property is held by them on trust<sup>7</sup>.

1 *Aas v Benham* [1891] 2 Ch 244, CA; *Trimble v Goldberg* [1906] AC 494; *Re Lewis, Lewis v Lewis* [1910] WN 217. See also PARTNERSHIP vol 79 (2008) PARA 5.

2 *Lister & Co v Stubbs* (1890) 45 ChD 1, CA. See also PARA 687 post.

3 *Re Lister & Co v Stubbs* (1890) 45 ChD 1, CA.

4 See *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC. Although a decision of the Privy Council is technically not binding on the English courts (see *A-G v Blake* [1997] Ch 84 at 96, [1996] 3 All ER 903 at 912 per Scott V-C), it is thought that the decision in *Lister & Co v Stubbs* (1890) 45 ChD 1, CA, can now be regarded as wholly discredited (see *Worcester Works Finance Ltd v Cooden Engineering Ltd* [1972] 1 QB 210 at 217, [1971] 3 All ER 708 at 711, CA, per Lord Denning MR).

In *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) at [86]-[89], [2005] Ch 119 at [86]-[89], [2005] 4 All ER 73 at [86]-[89] Lawrence Collins J said there were powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty and that he would have applied *A-G for Hong Kong v Reid* supra in preference to *Lister & Co v Stubbs* supra had it been necessary. However, he found two significant features distinguishing *Lister & Co v Stubbs* supra from *Daraydan Holdings Ltd v Solland International Ltd* supra, in that: (1) there was evidence that the price was increased by the amount of the bribe so that the bribe was actually paid out of money of the claimants; and (2) the portion representing the bribe was paid as a result of a fraudulent misrepresentation, to which the agent was a party, that the inflated price was the true price. The bribe derived from the claimant's own money, making it a case where there was a proprietary basis for the claim.

5 *Featherstonhaugh v Fenwick* (1810) 17 Ves 298; *Cassels v Stewart* (1881) 6 App Cas 64 at 77, 79, HL; *Gordon v Gonda* [1955] 2 All ER 762 at 766, 768, [1955] 1 WLR 885 at 894-895, 897, CA.

6 *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA; cf *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605. In *Don King Productions Inc v Warren* [2000] Ch 291, [1999] 2 All ER 218, CA, the benefit of all contracts concluded by a partner before the final winding up was found to be held on trust for the partnership because the partnership and each partner's obligations were deemed to continue for the purposes of winding up. However the partners can vary the position by agreement: *Lindsley v Woodfull* [2004] EWCA Civ 165, [2004] EWCA Civ 720, [2004] 2 BCLC 131. See further PARTNERSHIP vol 79 (2008) PARA 73.

7 See PARTNERSHIP vol 79 (2008) PARA 119.

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## **619. Relationship between solicitor and client.**

Although a fiduciary relationship exists between a solicitor and his client to the extent that, on a gift by the client to the solicitor, undue influence is presumed<sup>1</sup>, the relationship between them is not that of trustee and beneficiary<sup>2</sup>. A solicitor may, however, constitute himself a constructive trustee by his transactions or conduct<sup>3</sup>. Money held in a solicitor's client account is held on trust and the terms of the trust will be affected by any undertaking given by the solicitor as to the purposes for which the money will be applied<sup>4</sup>.

1 See *Wright v Carter* [1903] 1 Ch 27, CA; and LEGAL PROFESSIONS vol 66 (2009) PARA 798 et seq.

2 *Fyler v Fyler* (1841) 3 Beav 550. See LEGAL PROFESSIONS vol 66 (2009) PARA 763 et seq (relationship established by retainer), LEGAL PROFESSIONS vol 65 (2008) PARA 745 et seq (liability as an officer of the court). Money in a client's account is in some sense trust money: see LEGAL PROFESSIONS vol 66 (2009) PARA 764.

3 *Bulkley v Wilford* (1834) 2 Cl & Fin 102 at 177, HL; *Harpham v Shacklock* (1881) 19 ChD 207, CA; *Re Vernon, Ewens & Co* (1886) 33 ChD 402, CA; *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217. See also LEGAL PROFESSIONS vol 66 (2009) PARA 764, 825. As to when the solicitor to a trustee becomes himself liable as a trustee to the beneficiaries see PARA 703 post. In *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367, it was decided (applying *Lister & Co v Stubbs* (1890) 45 ChD 1, CA) that money accepted by a solicitor as a bribe from an opposing litigant is not held on trust for the client. However, *Lister & Co v Stubbs* supra was doubted and said to be inconsistent with fundamental equitable principles in *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC: see PARA 618 note 4 ante.

4 See *Barclays Bank Ltd v Rolls Razor Ltd* [1970] AC 567, sub nom *Barclays Bank v Quistclose Investments Ltd* [1968] 3 All ER 651, HL; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. [2002] 2 All ER 377; *Templeton Insurance Ltd v Penningtons Solicitors LLP* [2006] EWHC 685 (Ch), [2006] All ER (D) 191 (Feb).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(ii) Trusts contrasted with other Relationships/620. Relationship between vendor, purchaser and auctioneer.

## 620. Relationship between vendor, purchaser and auctioneer.

A person who has bound himself by a specifically enforceable contract to sell real property to the purchaser is in a qualified sense a trustee of it for the purchaser, although not a bare trustee<sup>1</sup>. Until the completion of the purchase, he has a lien upon it for the payment of the purchase money and he retains a substantial interest in the property<sup>2</sup>. He must, however, keep the property in repair, and he must neither himself damage the property nor through lack of precautions permit others to damage it<sup>3</sup>. If the vendor in breach of contract conveys the property to a third person who takes free from the contract, the purchaser may claim either damages from the vendor or the purchase money paid to the vendor by the third person (or anything purchased with it)<sup>4</sup>. This latter remedy flows logically from the trust imposed on the vendor in favour of the purchaser.

If the whole of the purchase price is paid, the vendor may properly be described as a bare trustee. However, the trust on which the vendor holds the property has no existence except as the equitable consequence of the contract, with potentially fatal results if the contract was registrable<sup>5</sup> as a land charge<sup>6</sup>.

An auctioneer holds as trustee money received by him on the vendor's behalf in respect of a sale<sup>7</sup>.

1 See *Green v Smith* (1738) 1 Atk 572 at 576; *Earl of Egmont v Smith* (1877) 6 ChD 469 at 475 per Jessel MR; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 397 per Kekewich J; *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 269, [1946] 1 All ER 284 at 286, CA; *Oughtred v IRC* [1960] AC 206 at 240, [1959] 3 All ER 623 at 633, HL, per Lord Jenkins; *Property Discount Corp Ltd v Lyon Group Ltd* [1980] 1 All ER 334 at 338 (affd [1981] 1 All ER 379, [1981] 1 WLR 300, CA). The vendor shares with a genuine trustee the right to reimbursement for legitimate expenses: *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162. Unlike a genuine trustee he is entitled to retain intervening rents and profits: *Berkley v Poulett* [1977] 1 EGLR 86 at 93, CA, per Stamp LJ. The purchaser's equitable interest is not destroyed if the vendor is a company which is placed in receivership by a debenture holder: *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495. See also SALE OF LAND vol 42 (Reissue) PARAS 177-178.

2 *Lysaght v Edwards* (1876) 2 ChD 499 at 506-507 per Jessel MR. See also *Shaw v Foster* (1872) LR 5 HL 321 at 338. As to lien generally see LIEN.

3 *Earl of Egmont v Smith* (1877) 6 ChD 469; *Clarke v Ramuz* [1891] 2 QB 456, CA; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770; *Davron Estates Ltd v Turnshire Ltd* (1982) 133 NLJ 937, CA. The vendor of a leasehold interest may not take steps which will lead to forfeiture (*Dowson v Solomon* (1859) 1 Drew & Sm 1) but the obligations do not extend to imposing covenants on purchasers of adjoining properties (*Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch) at [57]-[58], [2005] 3 All ER 307 at [57]-[58], [2005] 1 WLR 1961 at [57]-[58] per Lawrence Collins J). See also SALE OF LAND vol 42 (Reissue) PARAS 180-181.

4 *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073. See also SALE OF LAND vol 42 (Reissue) PARAS 179, 199.

5 Under the Land Charges Act 1972 s 4(6) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 643.

6 *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, [1996] 2 FLR 600, CA (payment of entire purchase price of a lease by a widow to her brother-in-law under an oral agreement that the property would be hers created a specifically enforceable contract; the court was not entitled to superimpose a further constructive trust, or interest under the doctrine of proprietary estoppel, on the brother-in-law in favour of the widow). It was pointed out that the result in that case would have been different if the title had been registered, when the purchaser

would have had an overriding interest under the Land Registration Act 1925 s 70(1)(g) (repealed) (see now the Land Registration Act 2002, Sch 3 para 2; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 962).

7 See AUCTION vol 2(3) (Reissue) PARA 222.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(ii) Trusts contrasted with other Relationships/621. Relationship between bank and depositor.

## 621. Relationship between bank and depositor.

The deposit of money with a bank normally gives rise to a loan (a debtor-creditor relationship) and not to a trust<sup>1</sup>. Special circumstances may, however, create a constructive trust in the case of a bank or other person with whom the money or property of another is deposited<sup>2</sup>. The same transaction may involve both a loan and a trust even though the concepts are normally mutually exclusive<sup>3</sup>. Thus money may be lent on trust to pay dividends to shareholders, so that, if that purpose is performed, the borrower is liable only as a debtor to the lender; but, if the purpose is not performed, the money is to be held on trust for the lender<sup>4</sup>. Similarly, where there is no loan but an antecedent debt, payment for a specific purpose creates a trust and, if that purpose is not carried out, the money is held on trust for the debtor<sup>5</sup>.

1 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 817. In *Sinclair v Brougham* [1914] AC 398, HL, the depositors in an ultra vires banking business were allowed to trace their sums deposited into the hands of the building society, which had run the bank, on the basis of a fiduciary relationship between the depositors and the directors; but this decision was doubted in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL. See PARA 1134 post. The relationship of debtor and creditor much not be converted into that of trustee and cestui que trust: see *Halifax Building Society v Thomas* [1996] Ch 217 at 229, [1995] 4 All ER 673 at 682, CA, per Peter Gibson LJ.

2 *Re Tidd, Tidd v Overell* [1893] 3 Ch 154; *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243. See also *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210, [1972] 1 WLR 602; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649. As to knowing receipt of trust funds see PARA 703 post; and as to dishonest assistance see PARA 704 post.

3 *Barclays Bank Ltd v Rolls Razor Ltd* [1970] AC 567 at 581-582, sub nom *Barclays Bank v Quistclose Investments Ltd* [1968] 3 All ER 651 at 656, HL, per Lord Wilberforce.

4 See *Barclays Bank Ltd v Rolls Razor Ltd* [1970] AC 567, sub nom *Barclays Bank v Quistclose Investments Ltd* [1968] 3 All ER 651, HL; *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658; *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA; *Lord Napier and Ettrick and Richards Butler v RF Kershaw Ltd* [1993] 1 Lloyd's Rep 10, CA (revsd in part [1993] AC 713, [1993] 1 All ER 385, HL, without discussion of this point); *R v Clowes (No 2)* [1994] 2 All ER 316, CA; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC; *R v Common Professional Examination Board, ex p Mealing-McCleod* (2000) Times, 2 May, [2000] All ER (D) 588, CA (bank loan for specific purpose of payment into court as security for the costs of an appeal on terms that the borrower was to be trustee of the money lent, and when the appeal was withdrawn the trust was enforced); *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377. See also Millett 'The Quistclose trust: who can enforce it?' (1985) 101 LQR 269. See PARA 708 post.

5 *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155.

## UPDATE

### 621 Relationship between bank and depositor

NOTE 1--See *Azam v Iqbal* [2007] EWHC 2025 (Admin), [2008] Bus LR, [2007] All ER (D) 45 (Jul) (no duty of trust impressed on funds advanced by customers to operator of money transfer service: operator free to deal with funds as he saw fit, subject to requirement to transfer required currency at agreed rate of exchange to designated account).





Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(ii) Trusts contrasted with other Relationships/622. Corporations and corporate property.

## **622. Corporations and corporate property.**

A company or corporation is not a trustee of its corporate property for its nominal members<sup>1</sup>. Furthermore, it is not ordinarily affected with trusts or equitable interests upon or subject to which its nominal members hold their shares or interests in it<sup>2</sup>; and an insurance company is not a trustee of money due under its policies<sup>3</sup>.

A promoter or a director of a company owes fiduciary duties to the company which may result in his holding specific property on constructive trust for the company or may make him personally liable to account to the company for a sum of money<sup>4</sup>. Persons who receive property from the promoter or director and who subsequently acquire notice of the company's claim may become trustees on the basis of knowing receipt<sup>5</sup>.

1 See *Short v Treasury Comrs* [1948] 1 KB 116 at 122, [1947] 2 All ER 298 at 301, CA, per Evershed LJ; *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 269, [1951] 2 All ER 779 at 794, CA; *Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193, [1981] 1 All ER 994. A company is not a trustee of dividends declared: see COMPANIES vol 15 (2009) PARA 1415.

2 See COMPANIES vol 14 (2009) PARAS 343, 403, 497; COMPANIES vol 15 (2009) PARAS 1417, 1698.

3 *Matthew v Northern Assurance Co* (1878) 9 ChD 80; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405, CA, per Buckley LJ; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA. See INSURANCE vol 25 (2003 Reissue) PARA 562.

4 See COMPANIES vol 14 (2009) PARA 53 et seq, 532 et seq. See also PARAS 687, 697 post.

5 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 707, [1996] 2 All ER 961 at 989-990, HL, per Lord Browne-Wilkinson; applied in *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(ii) Trusts contrasted with other Relationships/623. Contracts and covenants for the benefit of third persons.

### **623. Contracts and covenants for the benefit of third persons.**

There may be a trust of a contract. If one of two contracting parties contracts expressly as trustee for another person, that third person can enforce the trust<sup>1</sup>. A clear intention to create such a trust must be shown to render it enforceable<sup>2</sup>. Similar principles apply in establishing whether or not there is a trust of a covenant<sup>3</sup>.

These principles are now of less importance because, under the Contracts (Rights of Third Parties) Act 1999, a third party, without establishing a trust, may be able to enforce a term of a contract which purports to confer a benefit on him<sup>4</sup>, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party<sup>5</sup>.

1 *Tomlinson v Gill* (1756) Amb 330. See further EQUITY vol 16(2) (Reissue) PARA 609. See also PARAS 661-662 post; and CONTRACT vol 9(1) (Reissue) PARAS 760-762; INSURANCE vol 25 (2003 Reissue) PARA 557.

2 *Re Schebsman, ex p Official Receiver, Trustee v Cargo Superintendents (London) Ltd and Schebsman* [1944] Ch 83 at 89, [1943] 2 All ER 768 at 770, CA, per Lord Greene MR; *Green v Russell* [1959] 1 QB 28 at 43-44, [1958] 3 All ER 44 at 50 per Ashworth J (on appeal [1959] 2 QB 226 at 241-242, [1959] 2 All ER 525 at 531-532, CA). Trusts should not lightly be implied in commercial affairs: see *ED & F Man (Sugar) Ltd v Evalend Shipping Co SA* [1989] 2 Lloyd's Rep 192 at 202. As to trusts for creditors see PARA 668 post.

3 See *Davenport v Bishopp* (1843) 2 Y & C Ch Cas 451 at 460; *Fletcher v Fletcher* (1844) 4 Hare 67; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Royal Exchange Assurance v Hope* [1928] Ch 179, CA.

4 See the Contracts (Rights of Third Parties) Act 1999 s 1(1)(b); and PARA 662 post. See also CONTRACT.

5 See *ibid* s 1(2); and PARA 662 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/624. Express trusts and trusts arising by operation of law.

### **(iii) Classification of Trusts**

#### **624. Express trusts and trusts arising by operation of law.**

There is no generally agreed classification of trusts. Under one classification trusts are either:

- 5 (1) express trusts, which are created expressly or impliedly by the actual terms of some instrument or declaration, or which by some enactment are expressly imposed on persons in relation to some property vested in them, whether or not they are already trustees of that property<sup>1</sup>; or
- 6 (2) trusts arising by operation of law (other than express trusts imposed by enactments)<sup>2</sup>.

1 Trusts are expressly imposed by eg the Administration of Estates Act 1925 s 33 (as amended) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 555); the Land Registration Act 2002 s 7 (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 829); the Law of Property Act 1925 ss 34(2), (3), 36(1) (as amended) (see REAL PROPERTY vol 39(2) (Reissue) PARA 211); and the Settled Land Act 1925 s 36(2) (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 713). As to the imposition of trusts of land by statute generally see SETTLEMENTS vol 42 (Reissue) PARA 899. Trusts imposed by statute in the context of the exercise of a public function do not necessarily bring with them the full range of trust obligations attendant upon a private law trust: *Re Ahmed & Co (a firm)* [2006] EWHC 480 (Ch), (2006) 150 Sol Jo LB 402, [2006] All ER (D) 195 (Mar) (Law Society held to be carrying out a public function when holding money of a solicitor's firm in exercise of its power of intervention in relation to solicitors' practices under the Solicitors Act 1974 s 35 (see LEGAL PROFESSIONS vol 66 (2009) PARA 891-892)). The label 'statutory trust' can characterise a trust that does not bear all the indicia of a trust as would be recognised by a Court of Chancery apart from the statute: *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 at 178, [1975] 2 All ER 537 at 542, HL, per Lord Diplock.

2 It no longer makes any difference for the purposes of limitation of actions whether a trust is an express trust or not: see LIMITATION PERIODS vol 68 (2008) PARAS 1140, 1149-1152.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/625. Resulting and constructive trusts.

## 625. Resulting and constructive trusts.

Resulting trusts and constructive trusts arise, or are implied, by operation of law, and may or may not reflect the intention of the persons concerned, whereas express trusts arise from the intention of the disposer ascertained from the formal or informal words used by him. The formal requirements of the Law of Property Act 1925 as to the creation of interests in land<sup>1</sup> do not affect the creation or operation of resulting or constructive trusts<sup>2</sup>.

Resulting trusts are of two kinds<sup>3</sup>. A presumed resulting trust arises from the application of a rebuttable presumption of intention that property purchased wholly or partly by X but vested in Y's name should be held by Y on trust for X to the extent of X's share in the purchase; likewise, where there is a voluntary transfer by X into the name of Y or the joint names of X and Y, there is a presumption of a resulting trust for X<sup>4</sup>. An automatic resulting trust arises where X transfers property to Y on trusts which for some reason fail to dispose wholly of X's beneficial ownership so that Y automatically and irrebuttably holds the property on trust for X to the extent of X's undisposed of beneficial interest<sup>5</sup>.

A constructive trust is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of particular property to hold it purely for his own benefit<sup>6</sup>. It is imposed irrespective of the intentions of the persons concerned, although it may coincide with their original intentions where the person who had agreed to hold property as express trustee subsequently relies on the absence of the requisite statutory formalities to claim the property as sole beneficial owner<sup>7</sup>. It is, however, possible to regard this latter situation as an express trust enforced as such and exempted from the statutory formalities on the basis that equity will not allow a statute to be used as an instrument of fraud<sup>8</sup>.

Not only are the requirements for resulting and constructive trusts distinct, but their effects may be different<sup>9</sup>.

1    le the Law of Property Act 1925 s 53(1): see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

2    See *ibid* s 53(2); and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24. This provision also refers to 'implied' trusts, as 'implied' was often used as a synonym for 'resulting' or 'constructive' or both.

3    *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269 at 291, [1974] 1 All ER 47 at 68 per Megarry J (revsd without affecting this point [1974] Ch 269, [1974] 3 All ER 205, CA); *Allen v Rochdale Borough Council* [2000] Ch 221, [1999] 3 All ER 443, CA. See also PARA 705 et seq post. It has been suggested that resulting trusts of registered land are not generally consistent with the Land Registration Act 1925 (repealed: see now the Land Registration Act 2002; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 810 et seq): see Wilde 'Resulting Trusts of Registered Land: when is recognising them consistent with the terms of the Land Registration Act 1925?' [1999] Conv 382.

4    *Re Vinogradoff* [1935] WN 68. See also PARA 713 post. As to a voluntary conveyance of real property see PARA 718 post.

5    This may be the last thing intended by X: see eg *Re Vandervell's Trust (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269, [1974] 1 All ER 47.

The analysis of this category of resulting trust by Megarry J in *Re Vandervell's Trust (No 2)*, *White v Vandervell Trustees Ltd* supra has been doubted: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708, [1996] 2 All ER 961 at 991, HL, per Lord Browne-Wilkinson, who stated that in his

view if the settlor has expressly or by necessary implication abandoned any beneficial interest in the trust property there would be no resulting trust but the interest that was not disposed of would vest in the Crown as bona vacantia. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

6 *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL. See also PARA 687 et seq post.

English law has not followed other jurisdictions where the constructive trust has become a remedy for unjust enrichment, and has in general remained essentially a substantive institution: see *Halifax Building Society v Thomas* [1996] Ch 217 at 229, [1995] 4 All ER 673 at 682, CA, per Peter Gibson LJ. See also PARA 621 note 2 ante.

7 *Bannister v Bannister* [1948] 2 All ER 133, CA.

8 *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 208, CA; *Allen v Snyder* [1977] 2 NSWLR 685, NSW CA.

9 Thus a wife's half share of a home on constructive trust principles was voidable under the Bankruptcy Act 1914 s 42 (repealed) on the bankruptcy of her husband, whilst her one-ninth share as purchaser under a presumed resulting trust entitled her to one-ninth of the proceeds of sale received by the trustee in bankruptcy: see *Re Densham (a bankrupt), ex p trustee of bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519.

## UPDATE

### 625 Resulting and constructive trusts

NOTE 4--See *Slater v Simm* [2007] EWHC 951 (Ch), [2007] WTLR 1043 (presumption of resulting trust proportionate to contributions to purchase price not rebutted by later conduct as parties' intentions assessed at time of acquisition).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/626. Executed and executory trusts.

## 626. Executed and executory trusts.

Express trusts may be either executed or executory<sup>1</sup>. A trust is executed in the technical sense where the terms of the trust are designated by the instrument or declaration creating it<sup>2</sup>, even though the creator directs a settlement to be executed embodying the designated provisions<sup>3</sup>. A trust is executory in the technical sense where the instrument or declaration by which it is created directs the subsequent execution of an instrument defining the trust and does not itself define with absolute precision the terms of that instrument<sup>4</sup>. In the case of an executed trust technical words will receive a strict construction. In the case of an executory trust the court considers the instrument as a whole in order to discover the creator's real intention and need not give his words their technical, legal meaning<sup>5</sup>. The distinction is now of little importance<sup>6</sup>.

1 For an example of both see *Re Beresford-Hope, Aldenham v Beresford-Hope* [1917] 1 Ch 287. As to executory trusts see PARAS 669-671 post.

2 *Lord Glenorchy v Bosville* (1733) Cas temp Talb 3 at 19 per Lord Talbot LC. In general a trust is executed when its creator has been his own conveyancer in defining it: *Franks v Price* (1840) 3 Beav 182; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 61, 210; *Doncaster v Doncaster* (1856) 3 K & J 26; *Fullerton v Martin* (1860) 1 Drew & Sm 31; *De Havilland v De Saumarez, De Havilland v Bingham* (1865) 14 WR 118; *Re Nelley's Trusts* (1877) 26 WR 88, CA. A trust or bequest of personal estate 'to be enjoyed with and go with the title' to a peerage is executed and not executory: *Re Johnston, Cockerell v Earl of Essex* (1884) 26 ChD 538.

3 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 61, 210.

4 *Lord Glenorchy v Bosville* (1733) Cas temp Talb 3 at 19 per Lord Talbot LC; *Bagshaw v Spencer* (1748) 1 Wils 238. See also PARA 670 post. In one sense all trusts are executory, as they have to be executed or carried out by the trustee: *Bellamy v Burrow* (1735) Cas temp Talb 97 at 108 per Lord Talbot LC; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559 at 570 et seq per Lord Eldon LC; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 61, 210 per Lord St Leonards.

5 *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 at 565; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469, CA; *Re Flavel's Will Trusts, Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444.

6 See the Law of Property Act 1925 ss 60, 130, 131 (all as amended); para 670 post; and REAL PROPERTY vol 39(2) (Reissue) PARAS 119, 172.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/627. Precatory trusts.

## **627. Precatory trusts.**

A precatory trust is a trust established by precatory words, such as expressions of confidence, request or desire that property will be applied for the benefit of a definite person or object, where these words are construed in equity as imperatively constituting a trust<sup>1</sup>. The expression is in fact a 'misleading nickname'<sup>2</sup> and is a way of saying that the court finds that there is a trust, although the trust is not expressed as such but by words of prayer or suggestion or the like<sup>3</sup>. Courts are now reluctant to find that precatory words create a trust unless there is little doubt that, looking at the instrument as a whole, a binding trust obligation was intended<sup>4</sup>.

1 *Knight v Knight* (1840) 3 Beav 148 at 171 et seq per Lord Langdale MR. See also PARAS 650-651 post.

2 *Re Williams, Williams v Williams* [1897] 2 Ch 12 at 27, CA, per Rigby LJ.

3 *Re Sanson, Sanson v Turner* (1896) 12 TLR 142.

4 *Re Oldfield, Oldfield v Oldfield* [1904] 1 Ch 549, CA; *Comiskey v Bowring-Hanbury* [1905] AC 84, HL; *Re Hill, Public Trustee v O'Donnell* [1923] 2 Ch 259; *Re Johnson, Public Trustee v Calvert* [1939] 2 All ER 458; *Re Steele's Will Trusts, National Provincial Bank Ltd v Steele* [1948] Ch 603, [1948] 2 All ER 193; *Re Hetherington* [1990] Ch 1, sub nom *Re Hetherington, Gibbs v McDonnell* [1989] 2 All ER 129; *Re Norton's Will Trusts, Lightfoot v Goldson* [1948] 2 All ER 842, [1949] LJR 53. See further PARAS 650-651 post.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/628. Secret trusts.

## **628. Secret trusts.**

A secret trust is created where property is in law given to a person either absolutely or upon an indefinite trust, but there has been an undertaking by him or an understanding between him and the donor, not clothed with the requisite formalities for the creation of a legal trust, that it is to be applied for the benefit of some other person or object<sup>1</sup>. There must be evidence that the testator intended to impose a legally enforceable duty and not merely a moral obligation<sup>2</sup>.

<sup>1</sup> *McCormick v Grogan* (1869) LR 4 HL 82 at 88-89 per Lord Hatherley LC; *Re Stead, Witham v Andrew* [1900] 1 Ch 237 at 240-241, CA, per Farwell J. See PARA 672 et seq post.

<sup>2</sup> *Kasperbauer v Griffiths* [2002] WTLR 333, CA.

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## **629. Voluntary trusts.**

A voluntary trust is a trust made for no valuable consideration, and is not enforceable in equity unless it has been completely constituted<sup>1</sup>. However, where a settlor has covenanted to transfer property to trustees, a beneficiary may now be able to enforce the covenant under the provisions of the Contracts (Rights of Third Parties) Act 1999<sup>2</sup>.

In general, unless the consideration is plainly illusory<sup>3</sup>, the court does not inquire into its adequacy and treats the trust as made for value<sup>4</sup>. Marriage by itself, without any further consideration, constitutes a valuable consideration<sup>5</sup>.

1 As to the enforceability of voluntary trusts see PARA 662 post.

2 See PARA 662 post. See also CONTRACT.

3 *Kelson v Kelson* (1853) 10 Hare 385.

4 *Townend v Toker* (1866) 1 Ch App 446.

5 *Ex p Marsh* (1744) 1 Atk 158. As to the spouses and issue within the marriage consideration see *Re Cook's Settlement Trusts*, *Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898; and SETTLEMENTS vol 42 (Reissue) PARAS 661-662.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/630. Public trusts.

### 630. Public trusts.

Trusts for public purposes<sup>1</sup> are either:

- 7 (1) charitable, in which case they are governed by the law relating to charitable trusts<sup>2</sup>; or
- 8 (2) for public objects which are not of a charitable character.

With certain exceptions<sup>3</sup>, trusts for public objects which are not of a charitable character are invalid if they infringe the law which restricts the creation of perpetuities<sup>4</sup>; and it seems that, even if they do not infringe the law against perpetuities, such trusts will not in general be recognised by the courts except in so far as they are for the benefit of ascertained or ascertainable beneficiaries<sup>5</sup>.

Certain trusts which might appear to be public charitable trusts are in fact private trusts. In particular, a trust for the benefit of a group of persons, however numerous, whose common and distinguishing quality is their relationship to a particular individual or individuals does not as a general rule constitute a public charitable trust, even though its purposes are such that it would have been a valid charitable trust if the range of potential beneficiaries had extended to the community at large or a section of it<sup>6</sup>.

1 As to the power of trustees of public trusts to act by a majority see *Wilkinson v Malin* (1832) 2 Cr & J 636; *Skinners' Co v Irish Society* (1838) 7 Beav 593; *Fletcher v Gibbon* (1856) 23 Beav 212; *Perry v Shipway* (1859) 4 De G & J 353; *Cooper v Gordon* (1869) LR 8 Eq 249; *Re Whiteley, Bishop of London v Whiteley* [1910] 1 Ch 600.

2 As to charitable trusts generally see CHARITIES. Substantial changes are made to charity law by the Charities Act 2006, though these do not affect taxation. In particular, the Act establishes a set of 12 heads of charity to replace the historic categorisation, with the emphasis on the public benefit requirement in every case, together with the removal of the presumption of public benefit from organisations for the relief of poverty, the advancement of religion and the promotion of education: see s 2 (not yet in force); and CHARITIES vol 8 (2010) PARA 2. As to the exemption of charitable trusts from the necessity for precision in the declaration of objects see CHARITIES vol 8 (2010) PARA 104 et seq. As to the application to charitable trusts of the law which restricts the creation of perpetuities see CHARITIES vol 8 (2010) PARA 141. As to the enforcement of charitable trusts see PARA 631 post; and CHARITIES vol 8 (2010) PARA 508.

3 Statutory provision has been made eg for the validation of certain trusts which would have failed because the trust property was not exclusively applicable for charitable purposes (see CHARITIES vol 8 (2010) PARA 97 et seq), certain occupational pension schemes (see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1044), certain trusts for the reduction of the National Debt (see PARA 686 post) and certain gifts on trust to use the income for the upkeep of historic buildings or gardens (see the Historic Buildings and Ancient Monuments Act 1953 ss 8(2), (5), 8A(2), (5), 8B(2), (5) (ss 8A, 8B as added); and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1067-1069). As to the validity of a gift to a perpetual unincorporated non-charitable institution if the gift can be construed as a gift to the existing individual members as an accretion to the institution's funds and if it is not subject to a trust which prevents them disposing of its corpus see generally GIFTS; and see also CHARITIES vol 8 (2010) PARAS 62, 142; NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 944 et seq; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005.

4 See CHARITIES vol 8 (2010) PARAS 62, 140-141; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1005.

5 See *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Re Shaw, Public Trustee v Day* [1957] 1 All ER 745, [1957] 1 WLR 729 (compromised on appeal [1958] 1 All ER 245n, CA); *Re Endacott, Corpe v Endacott* [1960] Ch 232 at 245-246, [1959] 3 All ER 562 at 567-568, CA; *Re Denley's Trust*

*Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33. See also PARA 607 ante.

6 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31, HL; but see *Dingle v Turner* [1972] AC 601 at 623, [1972] 1 All ER 878 at 889, HL, obiter per Lord Cross. See also CHARITIES vol 8 (2010) PARA 6 et seq. Certain trusts for the relief of poverty form an exception to this principle: see *Dingle v Turner* supra.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iii) Classification of Trusts/631. Private trusts.

### 631. Private trusts.

Within the category of private trusts come trusts for the benefit of particular individuals<sup>1</sup>, whether or not immediately ascertainable, or for the benefit of some aggregate of individuals ascertained by reference to some personal relationship<sup>2</sup>, and trusts for the benefit of particular animals and for the maintenance of tombs not forming part of a church<sup>3</sup>, but not trusts for the benefit of the public or a section of the public<sup>4</sup>.

Private trusts are enforceable by the beneficiaries, whereas public charitable trusts are enforceable at the instance of the Attorney General<sup>5</sup>.

1 As to trusts for minors and for their maintenance and advancement see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30 et seq.

2 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31, HL; *Re Denley's Trust Deed*, *Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65. If the trust is principally for the relief of poverty, even though the possible beneficiaries are ascertainable by reference to some personal tie, the trust may be treated as a public charitable trust and not a private trust: see *Gibson v South American Stores (Gath and Chaves) Ltd* [1950] Ch 177, [1949] 2 All ER 985, CA; *Dingle v Turner* [1972] AC 601, [1972] 1 All ER 878, HL.

3 See PARA 607 ante.

4 As to the distinction between public and private trusts see further CHARITIES vol 8 (2010) PARAS 6 et seq, 59 et seq.

5 *Wellbeloved v Jones* (1822) 1 Sim & St 40 at 43. Cf *Re Diplock*, *Wintle v Diplock* [1941] Ch 253 at 259, [1941] 1 All ER 193 at 198, CA (affd sub nom *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL); *Re Freeston's Charity*, *Sylvester v University College, Oxford* [1978] 1 All ER 481 at 490, [1978] 1 WLR 120 at 129 (this point not discussed on appeal [1979] 1 All ER 51, [1978] 1 WLR 741, CA). See also CHARITIES vol 8 (2010) PARA 508.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/632. Jurisdiction.

## **(iv) Courts and Procedure**

### **A. HIGH COURT**

#### **632. Jurisdiction.**

All causes and matters relating to the execution of trusts by the High Court are assigned to the Chancery Division<sup>1</sup>. Likewise, all proceedings brought in the High Court under the Trustee Act 1925 are assigned to the Chancery Division<sup>2</sup>. By that Act the court<sup>3</sup> is given power:

- 9 (1) to appoint new trustees<sup>4</sup>;
- 10 (2) to authorise a corporation appointed as trustee to charge remuneration<sup>5</sup>;
- 11 (3) to make vesting orders<sup>6</sup>;
- 12 (4) to authorise dealings with trust property<sup>7</sup>;
- 13 (5) to give judgment in the absence of a trustee<sup>8</sup>;
- 14 (6) to make orders as to the costs incident to applications for orders appointing new trustees and vesting orders<sup>9</sup>;
- 15 (7) to relieve a trustee from personal liability<sup>10</sup>; and
- 16 (8) to order a beneficiary to indemnify a trustee in respect of a breach of trust instigated or requested or consented to in writing by him<sup>11</sup>.

The High Court also has jurisdiction under the Variation of Trusts Act 1958 to approve arrangements varying or revoking trusts<sup>12</sup>.

The court has statutory jurisdiction to appoint a person as judicial trustee to be a trustee of a trust in certain cases<sup>13</sup>, and to entertain appeals against acts, omissions or decisions of the Public Trustee<sup>14</sup>.

Moreover, besides the jurisdiction given to it by statute, the court has a limited inherent jurisdiction to alter the terms of trusts<sup>15</sup>, and in exercise of its inherent jurisdiction may intervene in the management and administration of a trust where, for example, there is no trustee to carry it on or the trustee refuses to act<sup>16</sup>, and, where expedient, the court may order the trust fund to be paid into court<sup>17</sup>.

Rules of court may make provision for enabling any judgment given in a claim in the High Court relating to trusts, and falling within any description specified in rules of court, to be made binding on persons who are or may be affected by the judgment and would not otherwise be bound by it but who have in accordance with the rules been given notice of the claim and of such matters connected with it as the rules may require<sup>18</sup>.

In general, a trustee is entitled to be paid the costs of proceedings to which he is a party, in so far as they are not recovered from or paid by any other person, out of the relevant trust fund or estate<sup>19</sup>. Where the trustee is entitled to be paid any of those costs out of the fund, they will be assessed on the indemnity basis<sup>20</sup>.

1 Supreme Court Act 1981 s 61(1), Sch 1 para 1(c). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see COURTS. Accordingly the Supreme Court Act 1981 is renamed the Senior Courts Act

1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see COURTS. At the date at which this volume states the law no such day had been appointed.

All jurisdiction vested in the High Court under the Supreme Court Act 1981 belongs to all divisions alike (see the Supreme Court Act 1981 s 5(5); and COURTS vol 10 (Reissue) PARA 603), but a court of one division may refuse to exercise a power assigned to another division (see eg *Compton (Marquess of Northampton) v Compton (Marchioness of Northampton) and Hussey*[1960] P 201 at 211, [1960] 2 All ER 70 at 76, where what was then the Probate, Divorce and Admiralty Division was unwilling to order the removal of a trustee). As to the extent to which the authority having jurisdiction under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; repealed as from 1 October 2007) or the Mental Capacity Act 2005 Pt 2 (ss 45-61) (as amended) has concurrent jurisdiction with the High Court in relation to trustees who lack capacity see PARA 830 post; and MENTAL HEALTH vol 30(2) (Reissue) PARA 721. As to the jurisdiction of that authority in relation to the variation of trusts see PARA 1063 note 2 post; and MENTAL HEALTH vol 30(2) (Reissue) PARA 722.

2 CPR Sch 1 RSC Ord 93 r 4.

3 For the purposes of the Trustee Act 1925, 'the court' means the High Court or the county court, where those courts respectively have jurisdiction: s 67(1) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). As to county courts see PARAS 641-642 post.

4 See the Trustee Act 1925 s 41 (as amended); and PARA 849 et seq post.

5 See *ibid* s 42; and PARA 801 post.

6 See *ibid* ss 44-56 (as amended); and PARA 869 et seq post.

7 See *ibid* s 57; and PARA 1061 post.

8 See *ibid* s 59; and PARA 1077 post.

9 See *ibid* s 60; and PARAS 853, 873 post. As to trustee's costs in legal proceedings generally see PARA 906 et seq post.

10 See *ibid* s 61; and PARA 1123 post.

11 See *ibid* s 62 (as amended); and PARA 1131 post.

12 See the Variation of Trusts Act 1958 s 1 (as amended); and PARA 1062 et seq post. Proceedings by which an application is made under this provision are assigned to the Chancery Division: CPR 64.1(3).

13 See the Judicial Trustees Act 1896 s 1 (as amended); and PARA 760 et seq post.

14 See the Public Trustee Act 1906 s 10; and PARA 788 post. As to the Public Trustee see PARA 766 et seq post.

15 See PARA 1060 post.

16 See PARAS 1067-1068 post.

17 See PARA 917 post.

18 See the Administration of Justice Act 1985 s 47(1), (2); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 809. See also CPR 19.8A; para 640 post; and EXECUTORS AND ADMINISTRATORS. Different provision may be made under the Administration of Justice Act 1985 s 47 in relation to claims of different descriptions: s 47(3). As to the power of the High Court to authorise action to be taken in reliance on counsel's opinion see PARA 633 post. It is clear that the court has jurisdiction to make an order for payment out of moneys which are found to belong to some other person as is commonly done in relation to the costs of ascertaining who is beneficially interested under a trust: *Re Westdock Realisations Ltd*[1988] BCLC 354 at 359 per Browne-Wilkinson V-C.

19 See CPR 48.4(1), (2); and PARA 907 et seq post. As to the power to charge the costs of an application for an order appointing a new trustee or a vesting order see the Trustee Act 1925 s 60; and PARAS 853, 873 post.

20 See CPR 48(3); and PARA 907 et seq post.

## UPDATE

### 632 Jurisdiction

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTE 2--CPR Sch 1 RSC Ord 93 r 4 revoked: SI 2007/2204.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/633. Construction of trusts; reliance on counsel's opinion.

### **633. Construction of trusts; reliance on counsel's opinion.**

Where:

- 17 (1) any question of construction has arisen out of the terms of a trust; and
- 18 (2) an opinion in writing given by a person who has a ten-year High Court qualification<sup>1</sup> has been obtained on that question by the trustees under the trust,

the High Court may, on the application of the trustees and without hearing argument, make an order authorising the trustees to take such steps in reliance on that opinion as are specified in the order<sup>2</sup>.

The High Court may not, however, make such an order if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument<sup>3</sup>.

<sup>1</sup> le within the meaning of the Courts and Legal Services Act 1990 s 71 (as amended): see LEGAL PROFESSIONS vol 66 (2009) PARA 742.

<sup>2</sup> Administration of Justice Act 1985 s 48(1) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 63). As to the procedure applicable to a claim under the Administration of Justice Act 1985 s 48 see PARAS 1074-1079 post.

<sup>3</sup> Ibid s 48(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/634. Claims relating to the administration of estates and trusts.

### **634. Claims relating to the administration of estates and trusts.**

High Court claims relating to the administration of estates of deceased persons and to trusts must be brought in the Chancery Division<sup>1</sup> by issuing a Part 8 claim form<sup>2</sup>. This applies to claims: (1) for the court to determine a particular question<sup>3</sup>; (2) for an order that the administration of the estate or the execution of the trust be carried out under the direction of the court (an 'administration order')<sup>4</sup>; (3) under the Variation of Trusts Act 1958<sup>5</sup>; or (4) authorised to rely on a written opinion<sup>6</sup> given by a person who has a ten-year High Court qualification<sup>7</sup>.

1 CPR 64.1(3).

2 CPR 64.3.

3 CPR 64.2(a); and *Practice Direction-Estates, Trusts and Charities* PD 64 para 1. See also PARA 635 post. As to the costs of applications under CPR 64.2(a) see *Practice Direction-Estates, Trusts and Charities* PD 64 para 6.

4 CPR 64.2(b); and *Practice Direction-Estates, Trusts and Charities* PD 64 para 3. See also PARA 636 post.

5 CPR 64.2(c); and *Practice Direction-Estates, Trusts and Charities* PD 64 para 4. As to the Variation of Trusts Act 1958 see PARA 1062 et seq post.

6 I.e. an opinion given under the Administration of Justice Act 1985 s 48 (see PARA 633 ante).

7 CPR 64.2(d); and *Practice Direction-Estates, Trusts and Charities* PD 64 para 5.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/635. Determination of questions.

### 635. Determination of questions.

A trustee<sup>1</sup> or a beneficiary may bring a claim in the High Court for the determination of any question arising in the execution of a trust<sup>2</sup>.

Types of claims which may be made<sup>3</sup> are:

- 19 (1) the determination of any of the following questions:
  1. (a) who is included in any class of persons having a claim against the estate of a deceased person or a beneficial interest in an estate or property subject to a trust<sup>4</sup>;
  2. (b) as to the rights or interests of any person claiming to be a creditor of the estate of a deceased person, to be entitled under a will or intestacy, or to be beneficially entitled under a trust<sup>5</sup>;
- 20 (2) a claim for any of the following remedies:
  3. (a) an order requiring a trustee to provide and, if necessary, verify accounts or to pay into court money held as a trustee, or to do or not do any particular act<sup>6</sup>;
  4. (b) an order approving any sale, purchase, compromise or other transaction by a trustee<sup>7</sup>; or
  5. (c) an order directing any act to be done which the court could order to be done if the estate or trust in question were being administered or executed under the direction of the court<sup>8</sup>.

The court will normally prefer to deal with specific issues rather than undertaking the administration of the estate or trust which is a cumbersome and expensive process<sup>9</sup>.

Where trustees do not have, or decide not to exercise, a power to pay the costs of a party to an application for the determination of a question arising in the execution of a trust, the trustees or the party concerned may apply to the court at any stage of proceedings for an order that the costs of any party (including the costs of the trustees) are to be paid out of the fund<sup>10</sup>.

1 For these purposes 'trustee' includes executors and administrators: CPR 64.1(2). See also PARA 601 ante.

2 CPR Pt 64. For guidance about applications by trustees for directions see *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust* PD 64b. Examples of applications for the determination of specific questions include an application for the construction of the trust instrument as to whether the trustees should bring or defend a claim (*Re Moritz* [1960] Ch 251, sub nom *Re Moritz, Midland Bank Executor and Trustee Co Ltd v Forbes* [1959] 3 All ER 767; *Re Eaton, Shaw v Midland Bank Executor and Trustee Co Ltd* [1964] 3 All ER 229n, [1964] 1 WLR 1269) or as to whether a fund may be distributed on the basis that a person is dead (*Re Newson-Smith's Settlement, Grice v Newson-Smith* [1962] 3 All ER 963n, [1962] 1 WLR 1478) or a woman is past child-bearing (*Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n, [1963] 1 WLR 820). See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 714.

3 ie claims which may be made under CPR 64.2(a) (see PARA 634 ante).

- 4 *Practice Direction-Estates, Trusts and Charities* PD 64 para 1(1)(a).
- 5 *Practice Direction-Estates, Trusts and Charities* PD 64 para 1(1)(b).
- 6 *Practice Direction-Estates, Trusts and Charities* PD 64 para 1(2)(a).
- 7 *Practice Direction-Estates, Trusts and Charities* PD 64 para 1(2)(b).
- 8 *Practice Direction-Estates, Trusts and Charities* PD 64 para 1(2)(c).
- 9 See PARA 636 post.
- 10 See *Practice Direction-Estates, Trusts and Charities* PD 64 paras 6.1-6.3.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/636. Application for administration of trust.

### **636. Application for administration of trust.**

A trustee<sup>1</sup> or a beneficiary may bring a claim in the High Court for the execution of a trust under the court's direction<sup>2</sup>. The court will only make an administration order<sup>3</sup> if it considers that the issues between the parties cannot properly be resolved in any other way<sup>4</sup>. Where an order is made for the sale of any property vested in trustees, those persons have the conduct of the sale unless the court directs otherwise<sup>5</sup>.

1 As to the meaning of 'trustee' see PARA 635 note 1 ante.

2 See CPR 64.2(b); and PARA 1075 post. Proceedings for the administration of a trust are brought using a Part 8 claim form: CPR 64.3. As to the persons to be made parties to such a claim see PARA 637 post. As to the Part 8 procedure see CPR Pt 8; and CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq.

3 For the meaning of 'administration order' see PARA 634 ante.

4 *Practice Direction-Estates, Trusts and Charities* PD 64 para 3.1. As to the court's powers where it is alleged that no or insufficient accounts have been furnished by the trustees see PARA 1075 note 3 post. As to breach of trust see PARA 1084 et seq post.

5 *Practice Direction-Estates, Trusts and Charities* PD 64 para 3.4.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/637. Parties to claims relating to the administration of estates and trusts.

### **637. Parties to claims relating to the administration of estates and trusts.**

In a claim relating to the administration of estates and trusts<sup>1</sup> all the trustees must be parties<sup>2</sup>. If the claim is made by trustees, any of them who does not consent to being a claimant must be made a defendant<sup>3</sup>. The claimant may make parties to the claim any persons with an interest in or claim against the estate or an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought<sup>4</sup>.

In a claim under the Variation of Trusts Act 1958<sup>5</sup> certain additional persons<sup>6</sup> must, if alive, be made parties unless the court directs otherwise<sup>7</sup>.

<sup>1</sup> I.e. a claim to which the CPR 64.4 applies, other than an application under the Administration of Justice Act 1985 s 48 (power of High Court to authorise action to be taken in reliance on counsel's opinion) (see PARA 633 ante). See also PARA 634 ante. This rule has effect notwithstanding anything in CPR 19.2 (see CIVIL PROCEDURE vol 11 (2009) PARA 213), and without prejudice to the court's powers under CPR Pt 19 (addition and substitution of parties) (see CIVIL PROCEDURE vol 11 (2009) PARA 207 et seq): see CPR 64.4. In an application under the Administration of Justice Act 1985 s 48 (see PARA 633 ante) a claim form may be issued without naming a defendant: see CPR 8.2A; and *Practice Direction-Estates, Trusts and Charities* PD 64 para 5. No separate application under CPR 8.2A need be made: *Practice Direction-Estates, Trusts and Charities* PD 64 para 5.

<sup>2</sup> CPR 64.4(1)(a).

<sup>3</sup> CPR 64 4(1)(b).

<sup>4</sup> CPR 64 4(1)(c). As to the application for joining of beneficiaries see *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust* PD 64b para 4.1.

<sup>5</sup> See PARA 1062 et seq post.

<sup>6</sup> I.e. any person who created the trust or provided property for the purposes of the trust: CPR 64.4(2)(a), (b).

<sup>7</sup> CPR 64.4(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/638. Service out of the jurisdiction.

### **638. Service out of the jurisdiction.**

A claim form may in general be served on a defendant out of the jurisdiction where each claim included in the claim form against the defendant to be served is a claim which the court has power to determine:

- 21 (1) under the Civil Jurisdiction and Judgments Act 1982<sup>1</sup>; or
- 22 (2) under the Judgments Regulation<sup>2</sup>; or
- 23 (3) under any other enactment<sup>3</sup>.

In other cases, a claim form may be served out of the jurisdiction with the permission of the court if:

- 24 (a) a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where the trusts ought to be executed according to English law and the person on whom the claim form is to be served is a trustee of the trusts<sup>4</sup>;
- 25 (b) a claim is made for a remedy against the defendant as a constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction<sup>5</sup>.

1 See CPR 6.19(1). The conditions in CPR 6.19(1)(a), (b) must be fulfilled. As to the claims which the court has power to determine under the Civil Jurisdiction and Judgments Act 1982 see CIVIL PROCEDURE.

2 CPR 6.19(1A). The conditions in CPR 6.19(1A)(a), (b) must be fulfilled. The 'Judgments Regulation' means EC Council Regulation 44/2001 (OJ L12, 16.01.01, p 1): CPR 6.18(j).

3 CPR 6.19(2). The conditions in CPR 6.19(2)(a), (b) must be fulfilled.

4 CPR 6.20(11).

5 CPR 6.20(14). When seeking to serve a defendant out of the jurisdiction as a constructive trustee it is not necessary to show that all the acts were committed within the jurisdiction so long as some of them were: *Polly Peck International plc v Nadir* [1992] BCLC 746.

### **UPDATE**

### **638 Service out of the jurisdiction**

TEXT AND NOTES--CPR Pt 6 substituted by SI 2008/2178.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/639. Representation of persons.

### **639. Representation of persons.**

In any claim about property subject to a trust, the court may make an order appointing a person to represent any other person or persons in the claim where the person or persons to be represented<sup>1</sup>:

- 26 (1) is or are unborn<sup>2</sup>;
- 27 (2) cannot be found<sup>3</sup>;
- 28 (3) cannot easily be ascertained<sup>4</sup>; or
- 29 (4) are a class of persons who have the same interest in a claim and either: (a) one or more members of that class are within head (1), (2) or (3) above; or (b) to appoint a representative would further the overriding objective<sup>5</sup>.

An application for any such order may be made at any time before or after a claim has started by any person who seeks to be appointed under the order, or by any party to the claim<sup>6</sup>.

The court's approval is required to settle a claim in which a party is acting as a representative under these provisions<sup>7</sup>, and approval will be given only where the court is satisfied that the settlement is for the benefit of all the represented persons<sup>8</sup>.

Unless the court otherwise directs, any judgment or order given in a claim in which a party is acting as a representative under these provisions is binding on all persons represented in the claim, but may only be enforced by or against a person who is not a party to the claim with the permission of the court<sup>9</sup>.

The court can give directions as to who should be joined as defendants and who should be given notice of proceedings<sup>10</sup>.

A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries')<sup>11</sup>. Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings<sup>12</sup>.

1 CPR 19.7(1), (2).

2 CPR 19.7(2)(a).

3 CPR 19.7(2)(b).

4 CPR 19.7(2)(c).

5 CPR 19.7(2)(d). As to the overriding objective see CPR Pt 1; and CIVIL PROCEDURE.

6 See CPR 19.7(3). As to the persons on whom an application for an order must be served see CPR 19.7(4).

7 CPR 19.7(5).

8 See CPR 19.7(6).

9 CPR 19.7(7).



10 See *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust* PD 64b paras 4, 5.

11 CPR 19.7A(1). The court may order any of the beneficiaries to be added as a new party, or to be substituted for an existing party, or to cease to be a party: see CPR 19.2. As to the personal representative of a deceased trustee as a party to a claim against a surviving trustee see PARA 1078 post.

12 CPR 19.7A(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/A. HIGH COURT/640. Order affecting a third party.

#### **640. Order affecting a third party.**

In a claim relating to property subject to a trust<sup>1</sup> the court may at any time direct that notice of any judgment or order given in the claim be served on any person who is not a party but who is or may be affected by it<sup>2</sup>.

Any person served with such a notice of a judgment or order is bound by the judgment or order as if he had been a party to the claim; but may, provided he acknowledges service within 28 days after the notice is served on him, apply to the court to set aside or vary the judgment or order and take part in any proceedings relating to the judgment or order<sup>3</sup>.

1 See CPR 19.8A(1)(b).

2 See CPR 19.8A(2).

3 CPR 19.8A(8).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(1) INTRODUCTION/(iv) Courts and Procedure/B. COUNTY COURTS/641. General jurisdiction.

## ***B. COUNTY COURTS***

### **641. General jurisdiction.**

A county court has all the jurisdiction of the High Court in proceedings for the execution of any trust or for a declaration that a trust subsists, or in certain proceedings for the variation of trusts<sup>1</sup>, where the estate or fund subject, or alleged to be subject, to the trust does not exceed the county court limit<sup>2</sup> in amount or value<sup>3</sup>. Moreover, this jurisdiction may be extended to an unlimited amount by a memorandum signed by the parties or by their respective legal representatives or agents<sup>4</sup>.

1 In proceedings under the Variation of Trusts Act 1958 s 1 (as amended): see PARA 1062 et seq post.

2 'The county court limit' for the purposes of the County Courts Act 1984 s 23 is £30,000: County Courts Jurisdiction Order 1981, SI 1981/1123, art 2, Table col 3 (amended by SI 1991/724); Interpretation Act 1978 s 17(2)(b). That sum is also the current limit for the purposes of county court jurisdiction under the Trustee Act 1925 ss 41, 42, 44-46, 51, 53, 57, 60-63 (ss 41, 62, 63 as amended): see s 63A (as added); and PARA 642 post.

3 County Courts Act 1984 s 23(b). In the Public Trustee Act 1906, 'court' includes a county court as respects trusts within its jurisdiction: see s 15; and PARA 767 note 9 post.

4 See the County Courts Act 1984 s 24(1), (2) (as amended); and COURTS vol 10 (Reissue) PARA 719. This jurisdiction by agreement does not extend, however, to proceedings under the Variation of Trusts Act 1958 s 1 (as amended): County Courts Act 1984 s 24(3).

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## **642. Jurisdiction as to particular matters.**

Without prejudice to the generality of its jurisdiction conferred by the County Courts Act 1984<sup>1</sup>, a county court has jurisdiction:

- 30 (1) where the trust estate or fund to be dealt with in the court does not exceed in amount or value the county court limit<sup>2</sup>, to appoint new trustees<sup>3</sup>, to authorise a corporation appointed as trustee to charge remuneration<sup>4</sup>, to make vesting orders as to stock and things in action<sup>5</sup>, to authorise dealings with trust property<sup>6</sup>, to make orders as to the costs incident to applications for orders appointing new trustees or vesting orders<sup>7</sup>, to relieve trustees from personal liability<sup>8</sup>, and to order a beneficiary<sup>9</sup> in certain circumstances to indemnify a trustee for a breach of trust<sup>10</sup>;
- 31 (2) where the land or the interest or contingent right in land which is to be dealt with in the court forms part of a trust estate which does not exceed in amount or value the county court limit, to make vesting orders of land<sup>11</sup>, orders as to contingent rights in land of unborn persons<sup>12</sup> and orders<sup>13</sup> as to interests of mortgagees who are minors<sup>14</sup>;
- 32 (3) where the judgment is given or order is made by the court, to make a vesting order consequential on an order for the sale or mortgage of land<sup>15</sup> or a vesting order<sup>16</sup> consequential on a judgment for specific performance<sup>17</sup>;
- 33 (4) where a vesting order can be made by the court, to appoint a person to convey the land or any interest therein<sup>18</sup>, or make an order<sup>19</sup> applicable to property out of England and Wales<sup>20</sup>;
- 34 (5) where the amount or value of the property to be dealt with does not exceed the county court limit, to make a vesting order<sup>21</sup> in relation to a minor's beneficial interest<sup>22</sup>;
- 35 (6) where the money or securities to be paid into court do not exceed in amount or value the county court limit, to accept or order<sup>23</sup> payment into court<sup>24</sup>.

Any reference to the court in the statutory provisions relating to the court's power to give judgment in the absence of a trustee<sup>25</sup> includes a reference to the county court<sup>26</sup>.

The jurisdiction of the court under the above heads may be extended, as respects any proceedings, by agreement<sup>27</sup>.

1    Ie the jurisdiction conferred by the County Courts Act 1984 s 23(b): see PARA 641 ante.

2    For these purposes, 'the county court limit' means, in its application to any enactment, the amount for the time being specified by an Order in Council under *ibid* s 145 (as amended) as the county court limit for the purposes of that enactment or, where no such Order in Council has been made, the corresponding limit specified by Order in Council under the County Courts Act 1959 s 192 (repealed): Trustee Act 1925 s 63A(5) (s 63A added by the County Courts Act 1984 s 148(1), Sch 2 Pt I para 1). At the date at which this volume states the law no such Order in Council had been made under the County Courts Act 1984 s 145 but, by virtue of the Trustee Act 1925 s 63A(5) (as added), the County Courts Jurisdiction Order 1981, SI 1981/1123 (as amended), specifying the county court limit of £30,000 for the purposes of the enactments specified in the Trustee Act 1925 s 63A(1), (2), (3)(c), (d) (as added), has effect as if so made.

3    Ie under *ibid* s 41 (as amended): see PARA 849 post.

- 4    Ie by order under ibid s 42: see PARA 801 post.
- 5    Ie under ibid s 51 (as amended): see PARA 884 post. As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.
- 6    Ie under ibid s 57: see PARA 1061 post.
- 7    Ie under ibid s 60: see PARAS 853, 873 post. As to a trustee's costs in legal proceedings generally see PARA 906 et seq post.
- 8    Ie by order under ibid s 61: see PARA 1123 post.
- 9    Ie under ibid s 62 (as amended): see PARA 1131 post.
- 10   Ibid s 63A(1) (as added: see note 2 supra).
- 11   Ie under ibid s 44: see PARA 875 post.
- 12   Ie orders under ibid s 45: see PARA 880 post.
- 13   Ie orders under ibid s 46: see PARA 881 post; and MORTGAGE vol 77 (2010) PARA 157.
- 14   Ibid s 63A(2) (as added: see note 2 supra).
- 15   Ie an order under ibid s 47: see PARA 882 post.
- 16   Ie an order under ibid s 48: see PARA 883 post.
- 17   Ibid s 63A(3)(a) (as added: see note 2 supra).
- 18   Ie under ibid s 50: see PARA 879 post.
- 19   Ie an order under ibid s 56: see PARA 870 post.
- 20   Ibid s 63A(3)(b) (as added: see note 2 supra).
- 21   Ie under ibid s 53: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 71.
- 22   Ibid s 63A(3)(c) (as added: see note 2 supra).
- 23   Ie under the powers conferred by ibid s 63 (as amended): see PARA 917 et seq post.
- 24   Ibid s 63A(3)(d) (as added: see note 2 supra).
- 25   Ie ibid s 59: see PARA 1077 post.
- 26   Ibid s 63A(4) (as added: see note 2 supra).
- 27   See the County Courts Act 1984 s 24(1), (2) (as amended); and PARA 641 ante.

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## **C. PROCEDURE**

### **643. Procedure.**

The Civil Procedure Rules now provide a single set of rules governing civil court procedure<sup>1</sup>.

Where the rules provide for the court to perform any act, then (except where an enactment, rule or practice direction provides otherwise) that act may be performed: (1) in relation to proceedings in the High Court, by any judge, master or district judge of that court; and (2) in relation to proceedings in the county court, by any judge or district judge<sup>2</sup>. There are, however, certain matters with which the master or district judge cannot deal without consent, including:

- 36 (a) approving compromises<sup>3</sup> (i) on behalf of a person under disability where that person's interest in a fund, or if there is no fund, the maximum amount of the claim, exceeds £100,000; and (ii) on behalf of absent, unborn and unascertained persons<sup>4</sup>;
- 37 (b) making declarations, except in plain cases<sup>5</sup>;
- 38 (c) making final orders under the Variation of Trusts Act 1958<sup>6</sup>, except for the removal of protective trusts where the interest of the principal beneficiary has not failed or determined<sup>7</sup>;
- 39 (d) where the proceedings are brought by a Part 8 claim form<sup>8</sup>, determining any question of law or as to the construction of a document which is raised by the claim form<sup>9</sup>;
- 40 (e) giving permission to trustees to bring or defend proceedings or to continue the prosecution or defence of proceedings, and granting an indemnity for costs out of the trust estate, except in plain cases<sup>10</sup>.

Whenever a master or district judge has jurisdiction, he may refer the matter to a judge instead of dealing with it himself<sup>11</sup>.

The general rule is that a hearing is to be in public<sup>12</sup>. It may, however, be in private if (A) publicity would defeat the object of the hearing<sup>13</sup>; (B) the hearing involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality<sup>14</sup>; (C) a private hearing is necessary to protect the interests of any child or patient<sup>15</sup>; (D) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing<sup>16</sup>; (E) the hearing involves uncontentious matters arising in the administration of trusts<sup>17</sup>; or (F) the court considers it to be necessary in the interests of justice<sup>18</sup>. An application by a trustee for directions as to bringing or defending legal proceedings<sup>19</sup>, and proceedings brought under the Inheritance (Provision for Family and Dependents) Act 1975<sup>20</sup>, should in the first instance be listed by the court for a hearing in private<sup>21</sup>.

Claims are generally made under the Part 8 procedure.

1 See CPR 2.1. The rules apply to proceedings in the High Court, county court and civil division of the Court of Appeal except for those set out in CPR 2.1.(2): CPR 2.1.

2 CPR 2.4.

3 le other than applications under the Inheritance (Provision for Family and Dependants) Act 1975: see CIVIL  
PROCEDURE.

4 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 5.1(a).

5 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 5.1(b).

6 le under the Variation of Trusts Act 1958 s 1(1): see PARAS 1062-1063 post; and CIVIL PROCEDURE.

7 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 5.1(c).

8 le by a Pt 8 claim form in accordance with *Practice Direction-How to Make Claims in Schedule Rules and  
Other Claims* PD 8B Section A.1(2) or (3). As to the Part 8 procedure see CPR Pt 8; and CIVIL PROCEDURE.

9 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 5.1(d).

10 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 5.1(e).

11 *Practice Direction-Allocation of Cases to Levels of Judiciary* PD 2B para 1.2.

12 CPR 39.2(1).

13 CPR 39.2(3)(a).

14 CPR 39.2(3)(c).

15 CPR 39.2(3)(d).

16 CPR 39.2(3)(e).

17 CPR 39.2(3)(f).

18 CPR 39.2(3)(g).

19 *Practice Direction-Miscellaneous Provisions relating to Hearings* PD 39 para 1.5(10).

20 *Practice Direction-Miscellaneous Provisions relating to Hearings* PD 39 para 1.5(9).

21 *Practice Direction-Miscellaneous Provisions relating to Hearings* PD 39 para 1.5.

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## **(2) EXPRESS TRUSTS**

### **(i) Constitution of an Express Trust**

#### **A. DECLARATION OF TRUST**

##### **644. Mode of declaration.**

A declaration of trust respecting any land or any interest in it must be manifested and proved by some writing signed by some person who is able to declare the trust or by his will<sup>1</sup>. The trust need not be constituted by the writing; the writing is only required as evidence of the declaration of trust<sup>2</sup> and accordingly it is sufficient that at some later stage there is some writing which is evidence of the fact of the trust<sup>3</sup>. The writing need not be in any particular form<sup>4</sup>; but it must contain all material terms of the trust<sup>5</sup>. Joinder of documents is permitted<sup>6</sup>. Writing is not necessary to support a trust which is actually in the course of being carried out by the person alleged to be a trustee<sup>7</sup>; nor will the absence of a writing enable a person who knows that land was conveyed to him as a trustee to claim it as his own<sup>8</sup>. Similarly, in the case of partnership property the absence of writing is immaterial<sup>9</sup>. A declaration after bankruptcy is effectual if the trust had existed before<sup>10</sup>.

A trust of personal estate inter vivos may be declared either in writing<sup>11</sup>, orally<sup>12</sup> or by conduct<sup>13</sup>.

A disposition of an equitable interest or trust subsisting at the time of disposition, whether relating to realty or personalty, must actually be in writing if it is to be effective<sup>14</sup>. If T holds realty or personalty on trust for A and A directs T to hold the property instead for B, this ranks as a disposition by A of A's subsisting equitable interest and consequently it must be in writing<sup>15</sup>. If A declares that he holds his equitable interest on trust for B so that T holds the property for B and not A, this also is a disposition which must be in writing<sup>16</sup>. If A does not disappear from the picture because he has active duties to perform, as, for example, where he declares that he holds his equitable interest on trust for B for life, remainder to C (or on discretionary trusts), then this is not a disposition which must be in writing<sup>17</sup>.

If intended to be testamentary, a trust of personalty or realty must be created by a duly executed will or codicil<sup>18</sup>.

1 See the Law of Property Act 1925 s 53(1)(b), replacing the Statute of Frauds (1677) s 7 (repealed). See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 24, 147-148; POWERS vol 36(2) (Reissue) PARA 265. See further *Riddle v Emerson* (1682) 1 Vern 108; *Willis v Willis* (1740) 2 Atk 71; *Adlington v Cann* (1744) 3 Atk 141; *Leman v Whitley* (1828) 4 Russ 423; *De Biel v Thomson* (1841) 3 Beav 469 (affd sub nom *Hammersley v Baron de Biel* (1845) 12 Cl & Fin 45 at 63, HL); *Tierney v Wood* (1854) 19 Beav 330; *Kronheim v Johnson* (1877) 7 ChD 60; *Dye v Dye* (1884) 13 QBD 147, CA; *Re Cozens, Green v Brisley* [1913] 2 Ch 478. A declaration of trust contained in a person's will may be sufficient: see *Re Northcliffe, Arnholz v Hudson* [1925] Ch 651. As to declarations of trust see also GIFTS vol 52 (2009) PARA 269.

2 *Forster v Hale* (1798) 3 Ves 696 (affd (1800) 5 Ves 308); *Re Holland, Gregg v Holland* [1902] 2 Ch 360, CA. If the writing has been destroyed, secondary evidence may be admissible: *Barber v Rowe* [1948] 2 All ER 1050, CA. An unsigned document may provide evidence of the parties' intentions: *Sleebush v Gordon* [2005] EWHC 3447 (Ch), [2004] All ER (D) 148 (Sep).



3 *O'Hara v O'Neill* (1717) 7 Bro Parl Cas 227; *Forster v Hale* (1800) 5 Ves 308 at 315 per Lord Loughborough LC; *Randall v Morgan* (1805) 12 Ves 67 at 74 per Grant MR; *Morton v Tewart* (1842) 2 Y & C Ch Cas 67; *Dale v Hamilton* (1846) 5 Hare 369 at 394. As to the stamp duty chargeable on the declaration see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARAS 1077-1078.

4 See eg *Deg v Deg* (1727) 2 P Wms 412 (recital in deed); *Forster v Hale* (1798) 3 Ves 696 (affd (1800) 5 Ves 308) (correspondence); *Cohen v Roche*[1927] 1 KB 169; *Hill v Hill*[1947] Ch 231, [1947] 1 All ER 54, CA.

5 *Smith v Matthews, Re Matthews' Settlement* (1861) 3 De GF & J 139 at 151-152; *Rochefoucauld v Boustead*[1897] 1 Ch 196, CA; *Hawkins v Price*[1947] Ch 645, [1947] 1 All ER 689; *Tweddell v Henderson*[1975] 2 All ER 1096, [1975] 1 WLR 1496; *Ram Narayan v Rishad Hussain Shah* [1979] 1 WLR 1349, PC (writing insufficient where it omitted reference to chattels included in one indivisible contract for land and chattels). Where a property is conveyed into the joint names of purchasers, a declaration that the survivor has power to give a good receipt for capital money without any declaration of trust in express terms is not to be construed as a declaration by the parties that they hold the property for themselves as joint tenants: *Stack v Dowden*[2005] EWCA Civ 857 at [9]-[10], [2006] 1 P & CR 244 at [9]-[10], [2006] 1 FLR 254 at [9]-[10] per Chadwick LJ (citing *Harwood v Harwood*[1992] 1 FCR 1, [1991] 2 FLR 274, CA; *Huntingford v Hobbs*[1993] 1 FCR 45, [1993] 1 FLR 736, CA).

6 *Timmins v Moreland Street Property Co Ltd*[1958] Ch 110, [1957] 3 All ER 265, CA; *Elías v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646, [1982] 3 All ER 801, PC.

7 *Harris v Horwell* (1708) Gilb Ch 11. A declaration of trust may after a length of time be presumed to have been made but to have been lost: *A-G v Boulton* (1794) 2 Ves 380 at 385; *Re Bishop Gore's Charities* (1843) 2 Con & Law 411.

8 *Riddle v Emerson* (1682) 1 Vern 108; *Hutchins v Lee* (1737) 1 Atk 447; *Knight v Pechey* (1759) 1 Dick 327; *Stickland v Aldridge* (1804) 9 Ves 516; *Morton v Tewart* (1842) 2 Y & C Ch Cas 67; *Childers v Childers* (1857) 1 De G & J 482, CA; *Davies v Otty* (1864) 2 De GJ & Sm 238; *Davies v Otty (No 2)* (1865) 35 Beav 208; *Haigh v Kaye*(1872) 7 Ch App 469; *Booth v Turle*(1873) LR 16 Eq 182; *Re Duke of Marlborough, Davis v Whitehead*[1894] 2 Ch 133; *Rochefoucauld v Boustead*[1897] 1 Ch 196 at 206, CA; *Bannister v Bannister*[1948] 2 All ER 133, CA. Cf EQUITY vol 16(2) (Reissue) PARAS 564, 851.

9 *Dale v Hamilton* (1846) 5 Hare 369; and see PARTNERSHIP vol 79 (2008) PARA 39.

10 *Gardner v Rowe* (1828) 5 Russ 258. The trust may be liable to be avoided under the Insolvency Act 1986: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq.

11 *Gee v Liddell* (1866) 35 Beav 621.

12 *Pary v Juxon* (1669) 3 Rep Ch 38; *Lady Bellasis v Compton and Frankland* (1693) 2 Vern 294; *Bayley v Boulcott* (1828) 4 Russ 345; *Benbow v Townsend* (1833) 1 My & K 506; *M'Fadden v Jenkyns* (1842) 1 Ph 153 at 157 per Lord Lyndhurst LC; *Peckham v Taylor* (1862) 31 Beav 250; *Grant v Grant* (1865) 34 Beav 623 at 625 per Romilly MR; *Jones v Lock*(1865) 1 Ch App 25; *Lyell v Kennedy, Kennedy v Lyell*(1889) 14 App Cas 437 at 457, HL, per Lord Selborne; *Re Kayford Ltd*[1975] 1 All ER 604, [1975] 1 WLR 279; *Paul v Constance*[1977] 1 All ER 195, [1977] 1 WLR 527, CA. See also PARA 647 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 24.

13 *Kilpin v Kilpin* (1834) 1 My & K 520; *M'Fadden v Jenkyns* (1842) 1 Ph 153; *Jones v Lock*(1865) 1 Ch App 25; *Grey v IRC*[1958] Ch 690 at 708, [1958] 2 All ER 428 at 432, CA, per Evershed MR, and at 719 and 440 per Morris LJ (affd [1960] AC 1, [1959] 3 All ER 603, HL).

14 Law of Property Act 1925 s 53(1)(c). See *Neville v Wilson*[1997] Ch 144, [1996] 3 All ER 171, CA (where the effect of a disposition of an equitable interest is to create a constructive or implied trust, the agreement for such a disposition does not have to be in writing, as the Law of Property Act 1925 s 53(2) applies in such circumstances), applying the view of Lord Radcliffe in *Oughtred v IRC*[1960] AC 206, [1959] 3 All ER 623, HL. As to dispositions to a fiduciary see *Re Tyler's Fund Trusts, Graves v King*[1967] 3 All ER 389, [1967] 1 WLR 1269; and as to disclaimer see *Re Paradise Motor Co Ltd*[1968] 2 All ER 625, [1968] 1 WLR 1125, CA. The nomination of a beneficiary under a life assurance policy, whether or not the nominee was under a duty to hold the funds on trust, does not involve a disposition under the Law of Property Act 1925 s 53: *Gold v Hill*[1999] 1 FLR 54. In relation to nominations under a staff pension fund see *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248. See also *Baird v Baird*[1990] 2 AC 548, [1990] 2 All ER 300, PC. In order for a document to effect a disposition, it must be unconditional: see *Clark v Chandler*[2002] EWCA Civ 1249, [2003] 1 P & CR 239, [2002] All ER (D) 246 (Jun). The party making the declaration must intend to create a new or different trust and not merely state the existing position: see *Hurst v Supperstone*[2005] EWHC 1309 (Ch), [2006] 1 FLR 1245.

15 *Grey v IRC*[1960] AC 1, [1959] 3 All ER 603, HL. See also *Oughtred v IRC*[1960] AC 206, [1959] 3 All ER 623, HL; *Re Holt's Settlement, Wilson v Holt*[1969] 1 Ch 100 at 116, [1968] 1 All ER 470 at 476; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[1976] 3 All ER 462, [1976] 1 WLR 852, CA (see especially at 472 and 865 per Goff LJ); *Chinn v Collins (Inspector of Taxes)*[1981] AC 533 at 548, [1981] 1 All ER 189 at 195, HL, per Lord Wilberforce; *Crowden v Aldridge*[1993] 3 All ER 603, [1993] 1 WLR 433. If, however, T holds property on trust for A, and T at A's request transfers the legal title to X, then A's request need not be in writing to dispose of his equitable interest: *Vandervell v IRC*[1967] 2 AC 291, [1967] 1 All ER 1, HL.

16 *Re Lashmar, Moody v Penfold*[1891] 1 Ch 258, CA; *Grainge v Wilberforce* (1889) 5 TLR 436; *Grey v IRC*[1960] AC 1, [1959] 3 All ER 603, HL.

17 *Onslow v Wallis* (1849) 1 Mac & G 506.

18 See the Wills Act 1837 s 9 (as substituted); and WILLS vol 50 (2005 Reissue) PARA 351 et seq. As to the ineffectiveness as a declaration of trust of words importing an intention to make a testamentary disposition see PARA 650 note 4 post.

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## **645. Declaration of trust without transfer of property.**

A person or corporation capable of disposing of property or of an interest in it by way of trust<sup>1</sup> may at any time create a trust by a declaration made in the proper legal mode<sup>2</sup> to the effect that specific property is thenceforth to be held by him or it in trust for a specified person or object<sup>3</sup>.

1 As to who may create a trust see PARA 606 ante.

2 *Wright v Lord Cadogan* (1764) 2 Eden 239 (affd (1766) 1 Bro Parl Cas 486, HL); *Middleton v Pollock, ex p Elliott* (1876) 2 ChD 104; *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA. See also *Re Cozens, Green v Brisley* [1913] 2 Ch 478 at 484. As to the proper legal mode see PARA 644 ante. If a person adds money of his own to a fund which he holds in trust and declares that he has done so, it is a valid declaration of trust of that money: *Thorpe v Owen* (1842) 5 Beav 224; *Gray v Gray* (1852) 2 Sim NS 273.

3 An effectual declaration of trust may be made by entries in books of account and memoranda: *Salter v Cavanagh* (1838) 1 Dr & Wal 668 at 686; *Stapleton v Stapleton* (1844) 14 Sim 186; *Vandenberg v Palmer* (1858) 4 K & J 204; *Evans v Jennings* (1858) 4 Jur NS 551; *Re Glover* (1862) 2 John & H 186; *Brewster v Prior* (1886) 55 LT 771; *Patrick v Simpson* (1889) 24 QBD 128; *Re Gompertz Estate, Parker v Gompertz* (1910) 55 Sol Jo 76; but see *Morgan v Larivière* (1875) LR 7 HL 423; *Re Rowe, Jacobs v Hind* (1889) 58 LJ Ch 703, CA; *Re Cozens, Green v Brisley* [1913] 2 Ch 478. A power of attorney may amount to a declaration of trust: *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 150; *Airey v Hall* (1856) 3 Sm & G 315. The approval of an incomplete draft of a trust instrument does not create a binding trust: *Re Sykes's Trusts* (1862) 2 John & H 415.

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#### **646. Declaration of trust as bill of sale.**

A written declaration of trust of personal chattels without transfer which otherwise falls within the terms of the Bills of Sale Act 1878 is a bill of sale within the meaning of that Act<sup>1</sup>.

<sup>1</sup> See the Bills of Sale Act 1878 s 4; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1638, 1642-1643.

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### **647. Declaration of trust on transfer of property.**

On a transfer of property, or of an interest in property, which of itself would vest the beneficial ownership of the property or interest in the transferee, the declaration of trust may be made by the instrument of transfer, if any, or by another instrument taking effect contemporaneously with the instrument of transfer, or, in the case of a transfer of personal estate inter vivos, by a contemporaneous oral declaration<sup>1</sup>.

<sup>1</sup> *Wright v Lord Cadogan* (1764) 2 Eden 239 at 256 per Lord Northington LC; *Childers v Childers* (1857) 1 De G & J 482, CA; *Re Bellasis' Trust* (1871) LR 12 Eq 218. An oral trust inter vivos may attach to a testamentary gift: *Nab v Nab* (1718) 10 Mod Rep 404; and see PARA 672 et seq post. As to an oral trust attaching to the gift of a promissory note and to a deposit of title deeds see *Lloyd v Chune* (1860) 2 Giff 441; *Arthur v Clarkson* (1866) 35 Beav 458; *Re Caplen's Estate*, *Bulbeck v Silvester* (1876) 45 LJ Ch 280; *Re Richards*, *Shenstone v Brock* (1887) 36 ChD 541. Cf *Re Whitaker* (1889) 42 ChD 119 at 125, CA, per Cotton LJ.

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#### **648. Declaration subsequent to transfer.**

Where a transfer of property is made to a person in such a manner or in such circumstances that he is thereby constituted not the absolute owner but a trustee of the property for the transferor, the transferor may at any time afterwards declare a specific trust of the property<sup>1</sup>. If the transferor subsequently declares that the trustee is to hold the property on trust for a third person, this disposition by the transferor of his subsisting equitable interest must be in writing<sup>2</sup>.

<sup>1</sup> *Crook v Brooking* (1688) 2 Vern 50, 106; *Forster v Hale* (1798) 3 Ves 696 at 707 per Arden MR. See PARA 644 ante.

<sup>2</sup> *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL; *Re Tyler's Fund Trusts*, *Graves v King* [1967] 3 All ER 389 at 392, [1967] 1 WLR 1269 at 1275 (where it was held that the writing need not comprise the particulars of the trust). The decision in *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269, [1974] 3 All ER 205, CA (despite certain remarks of Lord Denning MR) is not thought to require writing in the case of a resulting trust for the transferor. In that case, an option to purchase shares was held on resulting trust for V until V or the trustee declared new trusts. The declaration of new trusts by the trustee was held not to require writing as it was not a disposition of V's subsisting equitable interest but the creation of a new trust extinguishing V's interest. If V had declared the new trusts by directing the trustees to hold on new trusts, then it seems that this would have been a disposition of V's interest requiring writing: see *Grey v IRC* supra.

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## **B. CERTAINTY OF INTENTION**

### **649. Certainty of language.**

A trust can be created by any language which is clear enough to show an intention to create it<sup>1</sup>. If the word 'trust' is used it will normally be a strong indicator that a trust was intended<sup>2</sup>. A trust will not be imposed where the language of the creator expressly negatives any intention to impose a trust<sup>3</sup>.

1 *Re Williams, Williams v Williams*[1897] 2 Ch 12 at 18-19, CA, per Lindley LJ; *Re Kayford Ltd*[1975] 1 All ER 604, [1975] 1 WLR 279; *Re English and American Insurance Co Ltd* [1994] 1 BCLC 649. 'Certainty of intention is in many ways the most important certainty. If the court is satisfied that the alleged declarant had the requisite intention it will strive to validate it': *Tanna v Tanna*[2001] All ER (D) 333 (May) per Sir Andrew Morritt V-C.

See also *Duggan v Governor of Full Sutton Prison* [2004] EWCA Civ 78, [2004] 2 All ER 966, [2004] 1 WLR 1010 (held that nothing in the language of the Prison Rules 1999, SI 1999/728 (see PRISONS vol 36(2) (Reissue) PARA 567) should lead to the imposition of a trust on cash taken from a prisoner under those rules when it came into the hands of the prison governor).

As to charitable trusts see CHARITIES.

2 *Bath and North East Somerset Council v A-G*[2002] EWHC 1623 (Ch) at [22]-[25], 5 ITELR 274 at [22]-[25] per Hart J.

3 *Re Pitt Rivers, Scott v Pitt Rivers*[1902] 1 Ch 403, CA; cf *Re Falkiner, Mead v Smith*[1924] 1 Ch 88.

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## 650. Imperative declaration.

In declaring a trust the word usually and technically employed is 'trust'<sup>1</sup>. A trust may, however, be created by the general tenor of an instrument without using the word 'trust'<sup>2</sup>. Where the creator of the trust is to be the trustee, any expressions will suffice from which it is clear that the person using them considers himself a trustee and adopts that character<sup>3</sup>. A promise or an expression of intention to transfer property, or to give an imperfect gift, is not effectual as a declaration of trust<sup>4</sup>. In case of doubt the settlor's contemporaneous and subsequent acts may be looked at<sup>5</sup>.

<sup>1</sup> *Cave v Mackenzie* (1877) 46 LJ Ch 564 at 567; *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, CA. As to the mode of declaration see PARA 644 et seq ante.

<sup>2</sup> *Lewis v Madocks* (1803) 8 Ves 150; *Cary v Cary* (1804) 2 Sch & Lef 173; *Ex p Pye, ex p Dubost* (1811) 18 Ves 140; *King v Denison* (1813) 1 Ves & B 260 at 273 per Lord Eldon LC; *Rycroft v Christy* (1840) 3 Beav 238; *Dillon v Cruise* (1840) 3 I Eq R 70 at 83; *Crockett v Crockett* (1848) 2 Ph 553; *Kekewich v Manning* (1851) 1 De GM & G 176 at 194; *Page v Cox* (1852) 10 Hare 163 at 168-169 per Turner V-C; *Salisbury v Denton* (1857) 3 K & J 529; *Jacquet v Jacquet* (1859) 27 Beav 332; *Grant v Grant* (1865) 34 Beav 623 at 625 per Romilly MR; *Gee v Liddell* (1866) 35 Beav 621; *Richardson v Richardson* (1867) LR 3 Eq 686; *Bird v Harris* (1870) LR 9 Eq 204; *Morgan v Malleson* (1870) LR 10 Eq 475; *Armstrong v Timperon* (1871) 24 LT 275; *Baddeley v Baddeley* (1878) 9 ChD 113; *Fox v Hawks, Hawks v Fox* (1879) 13 ChD 822; *Talbot v O'Sullivan* (1880) LR 6 IR 302; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. See also *Re Endacott, Corpe v Endacott* [1960] Ch 232 at 241, [1959] 3 All ER 562 at 564, CA (where in a gift by will the words 'for the purpose of providing some useful memorial to myself' were considered to have been intended to impose an obligation in the nature of a trust). A mere direction to pay dividends may be sufficient to create a trust: *Bentley v Mackay* (1851) 15 Beav 12. See also *Hunter v Moss* [1994] 3 All ER 215, [1994] 1 WLR 452, CA; and PARA 653 post.

<sup>3</sup> See *Paul v Constance* [1977] 1 All ER 195, [1977] 1 WLR 527, CA (where a statement by a man to his mistress that money in his deposit account was as much hers as his constituted an express declaration of trust), applied in *Rowe v Prance* [1999] 2 FLR 787, [1999] Fam Law 623 (continued assurances as to joint ownership of boat sufficient to create express trust). See also *Dipple v Corles* (1853) 11 Hare 183 at 184 per Wood V-C; *Re Bankhead's Trust* (1856) 2 K & J 560; *Richards v Delbridge* (1874) LR 18 Eq 11 at 14; *Heartley v Nicholson* (1875) LR 19 Eq 233; *Re Kayford Ltd* [1975] 1 All ER 604, [1975] 1 WLR 279 (trust of customers' money paid in advance for goods); *Re Chelsea Cloisters Ltd* (1980) 41 P & CR 98, CA (trust of tenants' damage deposit money); *Re Eastern Capital Futures Ltd (in liquidation)* [1989] BCLC 371; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC. See also *Re English and American Insurance Co Ltd* [1994] 1 BCLC 649; *Re Stapylton Fletcher Ltd (in administrative receivership)*, *Re Ellis Son & Vidler Ltd (in administrative receivership)* [1995] 1 All ER 192, [1994] 1 WLR 1181 (both stressing the significance of an obligation of segregation). See further *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, [1995] BCC 514; *Re Branstons & Gothard Ltd* [1999] 1 All ER (Comm) 289, [1999] BPIR 466. Contrast *Re Multi Guarantee Co Ltd* [1987] BCLC 257, CA; *Re Holiday Promotions (Europe) Ltd* [1996] 2 BCLC 618, [1997] BCC 671; *Re Challoner Club Ltd (in liquidation)* (1997) Times, 4 November; *Re B (child: property transfer)* [1999] 3 FCR 266, [1999] 2 FLR 418, CA (an order under the Guardianship of Minors Act 1971 transferring property from the father to the mother 'for the benefit of the child' held not to create a trust in favour of the child). It seems that payments added to a cheque or credit card voucher in settlement of a restaurant bill by way of tip are not held by the restaurateur on trust: *Nerva v RL & G Ltd* [1995] IRLR 200; but contrast *Shabinsky v Horwitz* (1973) 32 DLR (3d) 318, Ont HC. See also *Burton v FX Music Ltd* [1999] EMLR 826.

<sup>4</sup> *Dipple v Corles* (1853) 11 Hare 183; *Forbes v Forbes* (1857) 3 Jur NS 1206; *Penfold v Mould* (1867) LR 4 Eq 562; *Re Stallon, Stallon v Stallon* (1907) 51 Sol Jo 626; *O'Flaherty v Browne* [1907] 2 IR 416, CA. See also PARA 662 post; and GIFTS vol 52 (2009) PARAS 267, 269. Although equity will not aid a volunteer, it will not strive officiously to defeat a gift: *T Choithram International SA v Pagarani* [2001] 2 All ER 492 at 501, [2001] 1 WLR 1 at 11, PC (the deceased had executed a trust deed establishing a charitable foundation of which he was a trustee; immediately afterwards he stated orally that he was giving all his wealth to the foundation and gave instructions for a transfer to the trust but died without executing any share transfers; the Privy Council held that



his words of gift had to be given their only possible meaning in this context; the foundation had no legal existence apart from the trust declared by the foundation trust deed; therefore the words of apparently outright gift had to be construed as a gift on trust). See PARA 662 post.

Words which imply an intention to make a revocable or ambulatory or testamentary disposition do not suffice: *Gason v Rich* (1886) 19 LR Ir 391, Ir CA; *Towers v Hogan* (1889) 23 LR Ir 53; *Re Cozens*, *Green v Brisley* [1913] 2 Ch 478. Cf para 644 text and note 18 ante.

5 *Bentley v Mackay* (1851) 15 Beav 12 at 19. See also *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL; the Civil Evidence Act 1995; and CIVIL PROCEDURE.

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## 651. Precatory words.

A trust may be imposed by precatory words, that is words indicating a request, entreaty, desire, hope, confidence and the like as to the disposal of the property concerned<sup>1</sup>. Precatory words are considered by the court normally in connection with some testamentary disposition, but may have to be considered in connection with a transaction<sup>2</sup> or deed inter vivos. At one time the court treated precatory words as prima facie imposing a trust even when following a gift in terms absolute<sup>3</sup>. Towards the end of the nineteenth century, however, decisions began to take the opposite direction<sup>4</sup>. The question whether precatory words do or do not impose a trust is now to be decided having regard to the following rules of construction:

- 41 (1) precatory words, such as 'request', which in their ordinary meaning are not imperative, are prima facie to be given their ordinary meaning<sup>5</sup>;
- 42 (2) in each case the court must be guided by the intention to be gathered from the particular instrument as a whole rather than by the particular words in which the request etc is expressed<sup>6</sup>, but having regard to any surrounding circumstances which may legitimately be taken into consideration<sup>7</sup>; and this is so notwithstanding that there may be a decision to the contrary effect upon words more or less similar<sup>8</sup>;
- 43 (3) a gift which is in terms absolute is not to be cut down to a trust estate or to a life estate with a trust for disposal thereafter by mere precatory words<sup>9</sup>, unless the will read as a whole shows an intention to impose an obligation<sup>10</sup>; there is a rebuttable presumption that, where a testator makes a gift to his spouse and then to his children, there is an absolute gift in favour of the spouse in order to avoid the creation of an unintended life interest<sup>11</sup>; and the fact that by a codicil precatory words are attached to a gift made by a will in terms which confer an absolute interest on the donee may be a circumstance requiring the court to depart from the ordinary meaning of the precatory words<sup>12</sup>;
- 44 (4) if the circumstances so require, the use of the word 'trust' or an express declaration of trust in a will is construed as merely precatory or recommendatory<sup>13</sup>.

1 As to precatory trusts see also PARA 627 ante.

2 See *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, CA (where the precatory words relied on were uttered orally in connection with the delivery of family jewels, and the danger of giving an obligatory force to words in such circumstances is indicated at 487 by Lord Esher MR).

3 See eg *Malim v Keighley* (1795) 2 Ves 529; *Gully v Cregoe* (1857) 24 Beav 185; *Curnick v Tucker* (1874) LR 17 Eq 320.

4 See *Lambe v Eames* (1871) 6 Ch App 597; *Mussoorie Bank Ltd v Raynor* (1882) 7 App Cas 321, PC; *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA; *Re Diggles, Gregory v Edmondson* (1888) 39 ChD 253, CA; *Re Hamilton, Trench v Hamilton* [1895] 2 Ch 370, CA; *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483, CA; *Re Williams, Williams v Williams* [1897] 2 Ch 12, CA; *Comiskey v Bowring-Hanbury* [1905] AC 84, HL; *Re Conolly, Conolly v Conolly* [1910] 1 Ch 219; *Re Atkinson, Atkinson v Atkinson* (1911) 103 LT 860, CA.

5 *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483 at 486, CA, per Lord Esher MR. See also the cases cited in note 4 supra.

6 *Re Williams, Williams v Williams* [1897] 2 Ch 12 at 14, CA, per Romer J. In *Re Steele's Will Trusts, National Provincial Bank Ltd v Steele* [1948] Ch 603, [1948] 2 All ER 193, where the draftsman of a will had used the particular wording held to create a trust in *Shelley v Shelley* (1868) LR 6 Eq 540, Wynn-Parry J held that an intention to create a trust had been manifested.

7 *Viscount Hill v Dowager Viscountess Hill* [1897] 1 QB 483 at 493, CA, per Chitty LJ. The Administration of Justice Act 1982 s 21 has considerably relaxed the rules relating to the admission of extrinsic evidence in the interpretation of wills: see WILLS vol 50 (2005 Reissue) PARA 481 et seq. As to the general rules of interpretation of deeds and non-testamentary instruments see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

8 *Re Hamilton, Trench v Hamilton* [1895] 2 Ch 370 at 373, CA, per Lindley LJ; cf *Re Oldfield, Oldfield v Oldfield* [1904] 1 Ch 549, CA.

9 See *Re Conolly, Conolly v Conolly* [1910] 1 Ch 219 at 221-222; and the other cases cited in note 4 supra. See also *Re Johnson, Public Trustee v Calvert* [1939] 2 All ER 458. As to borderline cases see *Re Green, Shears v Lloyds Bank Ltd* [1935] WN 151.

10 *Re Williams, Williams v All Souls, Hastings, Parochial Church Council* [1933] Ch 244 at 253 per Farwell J.

11 See the Administration of Justice Act 1982 s 22; and WILLS vol 50 (2005 Reissue) PARA 654.

12 *Re Burley, Alexander v Burley* [1910] 1 Ch 215.

13 *Hughes v Evans* (1843) 13 Sim 496; *Williams v Roberts* (1857) 4 Jur NS 18; *Quayle v Davidson* (1858) 12 Moo PCC 268; *Clarke v Hilton* (1866) LR 2 Eq 810; *Irvine v Sullivan* (1869) LR 8 Eq 673; *Te Teira Te Paea v Te Roera Tareha* [1902] AC 56, PC. Cf *Re Blackwood, Graham v Hampson* [1953] NI 32, NI CA. If the context so requires, even the express constitution of a person as trustee may be disregarded: *Morrin v Morrin* (1886) 19 LR Ir 37.

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### **652. Desire as to employment of a person.**

A direction or desire or recommendation in a will that a particular person is to be employed as agent or in some other capacity in connection with the testator's estate does not by itself create a trust in his favour<sup>1</sup>.

<sup>1</sup> *Beckford v Beckford* (1783) 4 Bro Parl Cas 38; *Shaw v Lawless* (1838) 5 Cl & Fin 129, HL; *Finden v Stephens* (1846) 2 Ph 142; *Foster v Elsley* (1881) 19 ChD 518.

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### **C. CERTAINTY OF SUBJECT MATTER**

#### **653. Necessity for certainty of subject matter.**

In order to create a valid trust, the property to be affected by the trust must be either expressly designated<sup>1</sup> or so defined that it is capable of being ascertained<sup>2</sup>; otherwise the trust is void for uncertainty<sup>3</sup>. A trust of the residue of a fund after a gift out of it of an undefined amount for an object which for any cause fails will be an effectual trust of the whole fund<sup>4</sup>.

In the case of a trust of intangible assets, such as a purported trust of a specific sum of money forming part of a larger credit balance in a particular bank account, the question of certainty depends not on the application of any immutable principle based on the requirements of a need for segregation or appropriation, but rather on whether, immediately after the purported declaration of trust, the court could, if asked, make an order for the execution of the purported trust<sup>5</sup>. With regard to the segregation of funds, it seems that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust and that the absence of such a requirement, if there are no other indicators of a trust, normally negatives it<sup>6</sup>. The fact that a transaction contemplates the mingling of funds is not, however, necessarily fatal to a trust<sup>7</sup>. The courts are slow to introduce trusts into everyday commercial transactions<sup>8</sup>.

The beneficial interests to be taken by the beneficiaries must also be certain. If T devises four houses to trustees to convey to A whichever one he chooses and to convey the others to B, then, if A predeceases T, the trust in B's favour is void for uncertainty<sup>9</sup>. The trust would have been valid if the houses had been devised to the trustees upon discretionary trusts to convey such house as they chose to A and three houses to B<sup>10</sup>.

The law used to be clear that, if property were bequeathed to X to pass on in his will whatever was left at his death to Y, this would be treated as an absolute gift to X<sup>11</sup>. Where, however, X has actually agreed with the testator to carry out his intention under a secret trust or by way of mutual wills, it may now be that on X's death a trust will attach to whatever property of the testator X had at his death, and during his lifetime X will be under a fiduciary obligation not to dispose of the testator's property with wilful intent to prevent Y receiving the property<sup>12</sup>.

1 *Sprange v Barnard* (1789) 2 Bro CC 585 at 587-588; *Palmer v Simmonds* (1854) 2 Drew 221; *Re London Wine (Shippers) Ltd* (1975) 126 NLJ 977. See also *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 806, PC; *Re Stapylton Fletcher Ltd* [1995] 1 All ER 192, [1994] 1 WLR 1181. In order to establish a trust there must be identifiable trust property: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705, [1996] 2 All ER 961 at 988, HL, per Lord Browne-Wilkinson.

2 *Stead v Mellor* (1877) 5 ChD 225; *Re Reis, ex p Clough* [1904] 2 KB 769, CA. A trust of dividends for a period which is incapable of being ascertained cannot be upheld: *Re Moore, Prior v Moore* [1901] 1 Ch 936; distinguished in *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269, CA. In *Re Golay, Morris v Bridgewater* [1965] 2 All ER 660, [1965] 1 WLR 969, a bequest of 'a reasonable income' was held sufficiently certain. Where a fund is given in trust as to a part (the amount of which is capable of being ascertained) for an object which fails, and as to the remainder for another object, the gift is held to fail as to the part but to be good as to the remainder: *Mitford v Reynolds* (1842) 1 Ph 185; *Re Vaughan, Vaughan v Thomas* (1886) 33 ChD 187. As to charitable trusts see CHARITIES.

3 *Re Moore, Prior v Moore* [1901] 1 Ch 936.

4 *Fisk v A-G*(1867) LR 4 Eq 521; *Hunter v Bullock*(1872) LR 14 Eq 45; *Dawson v Small*(1874) LR 18 Eq 114; *Re Williams*(1877) 5 ChD 735; *Re Birkett* (1878) 9 ChD 576; *Champney v Davy*(1879) 11 ChD 949; *Re Rogerson, Bird v Lee*[1901] 1 Ch 715; *Kelly v A-G*[1917] 1 IR 183. See further CHARITIES vol 8 (2010) PARA 86.

5 *Hunter v Moss*[1994] 3 All ER 215, [1994] 1 WLR 452, CA (where *Re London Wine (Shippers) Ltd* (1975) 126 NLJ 977 (see note 1 supra) was accepted as correct but distinguished). The decision in *Hunter v Moss* supra was necessarily followed in *Re Harvard Securities Ltd (in liquidation)* [1998] BCC 567.

6 See *Henry v Hammond*[1913] 2 KB 515.

7 *R v Clowes (No 2)*[1994] 2 All ER 316, CA; *Re English & American Insurance Co Ltd*[1994] 1 BCLC 649.

8 See *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658 at 665 per Bingham J; cited with approval in *R v Clowes (No 2)*[1994] 2 All ER 316, CA. See also *Re ILG Travel Ltd (in administration)*[1995] 2 BCLC 128, [1996] BCC 21, where the agreement was held to take effect as an equitable charge.

9 *Boyce v Boyce* (1849) 16 Sim 476. Cf *Re Golay, Morris v Bridgewater*[1965] 2 All ER 660, [1965] 1 WLR 969; and note 2 supra.

10 Cf *Re Isaacs, Isaacs v Isaacs* (1948) 92 Sol Jo 336; *Re Barlow's Will Trusts*[1979] 1 All ER 296, [1979] 1 WLR 278.

11 *Sprange v Barnard* (1789) 2 Bro CC 585.

12 See *Ottaway v Norman*[1972] Ch 698, [1971] 3 All ER 1325; *Re Cleaver, Cleaver v Insley*[1981] 2 All ER 1018, [1981] 1 WLR 939; *Healey v Brown*[2002] EWHC 1405 (Ch), [2002] WTLR 849, 4 ITELR 894. As to mutual wills see PARA 692 post; and WILLS vol 50 (2005 Reissue) PARA 308. As to secret trusts see PARAS 672-677 post.

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## 654. No trusts of future property.

There cannot be a trust of future property, as that would be a trust of nothing at all. It is immaterial whether the settlor makes a purported voluntary assignment of future property to trustees on declared trusts or whether he purports to declare that he himself is holding future property on certain trusts<sup>1</sup>. If the future property subsequently materialises into existing property, the intended beneficiaries have no enforceable claim to it. If, however, the settlor received valuable consideration for creating a trust of future property, then, once the future property materialises into existing property, equity treats the settlor as holding the property on trust for the beneficiaries<sup>2</sup>. As he received consideration, his conscience is bound so that, on becoming at last entitled to specific property, he may not claim to retain it for himself<sup>3</sup>. If the settlor covenanted to create a trust of the future property, a beneficiary may be able to enforce it, even in the absence of consideration, when the future property materialises into existing property, under the Contracts (Rights of Third Parties) Act 1999<sup>4</sup>.

Future property includes the interest which a person hopes to take under the will or intestacy of a living person<sup>5</sup> or under the exercise of a special power of appointment<sup>6</sup>, future royalties from completed works<sup>7</sup>, future book debts<sup>8</sup>, freight not yet earned<sup>9</sup>, copyright in songs not yet written<sup>10</sup>, dividends not yet declared<sup>11</sup>, the proceeds of any future sale of specific property<sup>12</sup> and damages which may be recovered in pending litigation<sup>13</sup>. It does not include existing vested or contingent rights to obtain property at some future time<sup>14</sup>, for example B's interest where property is settled on A for life, remainder to B if he attains 35 years and is alive on A's death.

1 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920; *Williams v IRC* [1965] NZLR 395, NZ CA; *Norman v Federal Comr of Taxation* (1963) 109 CLR 9, [1964] ALR 131, Aust HC.

2 *Holroyd v Marshall* (1862) 10 HL Cas 191; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL; *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA. See also PERSONAL PROPERTY vol 35 (Reissue) PARA 1266.

3 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697 at 700. See also EQUITY vol 16(2) (Reissue) PARA 645.

4 See PARAS 661-662 post; and CONTRACT.

5 *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA; *Wu Koon Tai v Wu Yau Loi* [1997] AC 179, [1996] 3 WLR 778, PC.

6 *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920.

7 *Re Trytel, ex p Trustee of Property of Bankrupt v Performing Right Society Ltd and Soundtrac Film Co Ltd* [1952] 2 TLR 32. See also *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336.

8 *Tailby v Official Receiver* (1888) 13 App Cas 523, HL.

9 *Lindsay v Gibbs* (1856) 22 Beav 522.

10 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL.

11 *Norman v Federal Comr of Taxation* (1963) 109 CLR 9, [1964] ALR 131, Aust HC.

12 *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898.

13     *Glegg v Bromley* [1912] 3 KB 474, CA.

14     *Re Midleton's Will Trusts, Whitehead v Earl Midleton* [1969] 1 Ch 600 at 607, [1967] 2 All ER 834 at 837;  
*Re Ralli's Will Trusts, Re Ralli's Marriage Settlement, Calvocoressi v Rodocanachi* [1964] Ch 288, [1963] 3 All ER 940.



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## **D. CERTAINTY OF OBJECTS**

### **655. Necessity for certainty of objects.**

The objects or persons to be benefited by a trust must be expressly designated<sup>1</sup> or so defined that they are capable of being ascertained<sup>2</sup>, except where the trust is for charitable purposes<sup>3</sup>. Otherwise the trust is void for uncertainty<sup>4</sup>, and there is a resulting trust<sup>5</sup>.

If a trust requires division between all the members of a class, for example in equal shares, it will be void for uncertainty if it is not possible to provide a complete list of the beneficiaries, as the size of each equal share cannot be ascertained unless the precise number of beneficiaries is known<sup>6</sup>. Where the equal division is of capital and is to take place at some future date, it will be necessary at the date of commencement of the trust<sup>7</sup> to determine whether or not the description of the beneficiaries (for example, 'old friends', 'business associates', 'customers of my company', 'members of my family') is void for uncertainty.

If a trust accords trustees a discretion to select among a class of beneficiaries, it no longer fails if a list of every member of the class cannot be drawn up<sup>8</sup>; it suffices if it is possible to predicate of any proposed beneficiary that he is or is not a member of the class. If there remains a number of persons who cannot be proved to be inside or outside the class, for example old friends of the testator, then the trust fails<sup>9</sup>. It has, however, been held that, if a trust is construed as conferring individual gifts to persons qualifying under some condition precedent, then it is valid if one or more persons undoubtedly qualify, even though the conceptual uncertainty makes it impossible to determine whether other persons qualify<sup>10</sup>.

In a case of conceptual uncertainty it seems unlikely that the uncertainty can be cured by conferring a residual power upon the trustees to determine conclusively any doubts as to who are members of the beneficial class<sup>11</sup>.

There is on the one hand no rule of law that a testator cannot delegate the making of his will to his trustees since this would prevent the use of wide powers of appointment in wills. On the other hand there is a rule that a gift which is expressed in language too vague to be enforced cannot be rescued by giving the executor a power of choice<sup>12</sup>.

1 *Sprange v Barnard* (1789) 2 Bro CC 585 at 587-588; *Morice v Bishop of Durham* (1805) 10 Ves 522 at 542-543; *Re Hetley*, *Hetley v Hetley* [1902] 2 Ch 866; *OT Computers Ltd (in administration) v First National Tricity Finance Ltd* [2003] EWHC 1010 (Ch), [2003] All ER (D) 118 (May).

2 *Wright v Atkyns* (1823) Turn & R 143 at 158-159 per Lord Eldon LC; *Stead v Mellor* (1877) 5 ChD 225; *Re Endacott*, *Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA; *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, [1972] 2 All ER 1304, CA; *Re Barlow's Will Trusts* [1979] 1 All ER 296, [1979] 1 WLR 278. As to where a trust is created by words of reference to another declared trust see *Hindle v Taylor* (1855) 5 De GM & G 577; *Boyd v Boyd* (1863) 9 LT 166; *Heasman v Pearce* (1870) LR 11 Eq 522 at 538; *Cooper v Macdonald* (1873) LR 16 Eq 258; *Sweeting v Prideaux* (1876) 2 ChD 413; *Re Berners*, *Berners v Calvert* (1892) 67 LT 849; *Re Beaumont*, *Bradshaw v Packer* [1913] 1 Ch 325; *Re Fraser*, *Ind v Fraser* [1913] 2 Ch 224; *Re Wood*, *Wodehouse v Wood* [1913] 2 Ch 574, CA; *Re Arnell*, *Re Edwards*, *Prickett v Prickett* [1924] 1 Ch 473. Where a person is to forfeit his interest under a trust if a condition subsequent is satisfied, the condition is void unless he can tell distinctly and precisely what exactly is to occasion forfeiture: *Clavering v Ellison* (1859) 7 HL Cas 707 at 725; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL; *Re Tepper's Will Trusts*, *Kramer v Ruda* [1987] Ch 358, [1987] 1 All ER 970. The requirement of certainty is stricter for a condition subsequent than for a condition precedent: *Re Allen*, *Faith v*

*Allen*[1953] Ch 810, [1953] 2 All ER 898, CA; *Blathwayt v Baron Cawley* supra; *Re Barlow's Will Trusts*[1979] 1 All ER 296, [1979] 1 WLR 278; *Re Waring's Will Trusts, Harnett v Calvert*[1985] NI 105; *Re Tepper's Will Trusts, Kramer v Ruda* supra. For criticism of the distinction see the judgment of Denning LJ in *Re Tuck's Settlement Trusts, Public Trustee v Tuck*[1978] Ch 49 at 60, [1978] 1 All ER 1047 at 1051, CA.

3 As to the exception in the case of trusts for charitable purposes see PARA 608 ante; and CHARITIES vol 8 (2010) PARA 104 et seq.

4 *Morice v Bishop of Durham* (1805) 10 Ves 522 at 543; *Re Hetley, Hetley v Hetley*[1902] 2 Ch 866; *Re Wood, Barton v Chilcott*[1949] Ch 498, [1949] 1 All ER 1100; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Muir v IRC* [1966] 3 All ER 38, [1966] 1 WLR 1269, CA; *Re Pugh's Will Trusts, Marten v Pugh*[1967] 3 All ER 337, [1967] 1 WLR 1262. When the test for powers was more liberal than that for trusts, a valid power could not be spelt out of an invalid trust and, similarly, a valid power to effect pure abstract non-charitable purposes could not be spelt out of an invalid trust for pure abstract non-charitable purposes: see *IRC v Broadway Cottages Trust*[1955] Ch 20 at 36, [1954] 3 All ER 120 at 128, CA, per Jenkins LJ; *Re Shaw, Public Trustee v Day*[1957] 1 All ER 745 at 759, [1957] 1 WLR 729 at 746 per Harman J (compromised on appeal [1958] 1 All ER 245n, CA); *Re Endacott, Corpe v Endacott*[1960] Ch 232 at 246, [1959] 3 All ER 562 at 568, CA. Certain trusts which would have been void for uncertainty were validated by the Charitable Trusts (Validation) Act 1954: see ss 1, 2; and CHARITIES vol 8 (2010) PARAS 97-100.

5 *Morice v Bishop of Durham* (1805) 10 Ves 522 at 537, 543 per Lord Eldon LC; *IRC v Broadway Cottages Trust*[1955] Ch 20, [1954] 3 All ER 120, CA; *Re Sayer Trust, MacGregor v Sayer*[1957] Ch 423, [1956] 3 All ER 600; *Re Gillingham Bus Disaster Fund, Bowman v Official Solicitor*[1959] Ch 62, [1958] 2 All ER 749, CA. See also PARA 705 et seq post.

6 *Whishaw v Stephens*[1970] AC 508 at 524, sub nom *Re Gulbenkian's Settlement Trusts, Whishaw v Stephens*[1968] 3 All ER 785 at 792, HL; *Re Barlow's Will Trusts*[1979] 1 All ER 296, [1979] 1 WLR 278.

7 *Re Baden's Deed Trusts (No 2)*[1972] Ch 607, [1971] 3 All ER 985; affd [1973] Ch 9, [1972] 2 All ER 1304, CA.

8 *McPhail v Doulton*[1971] AC 424, [1970] 2 All ER 228, HL; *Brown v Gould*[1972] Ch 53, [1971] 2 All ER 1505.

9 *McPhail v Doulton*[1971] AC 424, [1970] 2 All ER 228, HL. There were, however, divergences as to the meaning of 'is or is not' in *Re Baden's Deed Trusts (No 2)*[1973] Ch 9, [1972] 2 All ER 1304, CA, where Stamp LJ took a strict literal view, and Megaw LJ considered the test satisfied if as regards a substantial number of objects it could be said with certainty that they fell within the trust, even though as regards a substantial number of other people the answer would have to be not that they were outside the trust, but that it was not proved whether they were in it or not. Accordingly, Megaw LJ and Sachs LJ held a discretionary trust for 'relatives' to be valid as applying in the broad sense to persons who were descendants from a common ancestor.

10 See *Re Barlow's Will Trusts*[1979] 1 All ER 296, [1979] 1 WLR 278 (where the testatrix directed the sale of some paintings subject to the provision that 'any members of my family and any friends of mine who may wish to do so' be allowed to purchase any painting at a price well below its value, and it was held that the direction was valid as it was possible in the circumstances to say that at least one or more than one of the claimants qualified).

11 *Re Coxen, McCullum v Coxen*[1948] Ch 747, [1948] 2 All ER 492; *Re Jones, Midland Bank Executor and Trustee Co Ltd v Jones*[1953] Ch 125, [1953] 1 All ER 357. For contrasting views, however, see the judgments of Lord Denning MR and Eveleigh LJ in *Re Tuck's Settlement Trusts, Public Trustee v Tuck*[1978] Ch 49, [1978] 1 All ER 1047, CA.

12 *Re Beatty's Will Trusts, Hinves v Brooke*[1990] 3 All ER 844, [1990] 1 WLR 1503.

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## 656. Administrative workability.

If a conceptually uncertain<sup>1</sup> class of beneficiaries is specified in a trust instrument, then clearly the trust is administratively unworkable. If, however, the class is certain enough but the definition of beneficiaries is so wide as not to form anything like a class with the result that the trust is administratively unworkable or one which cannot be executed<sup>2</sup>, then the trust will be void. Thus a trust for everyone in the world or for everyone but five named persons will be void<sup>3</sup> as, perhaps, would a discretionary trust for all the residents of Greater London<sup>4</sup>. It seems that the underlying reasoning for this is that a trust must be justiciable, and a court must act judicially according to sensible criteria expressly or impliedly provided by the trust instrument so that it may control or execute the trust.

A power for trustees with the previous written consent of the settlor to appoint anyone other than the settlor into a discretionary trust class of beneficiaries is valid as a power not to introduce anyone in the world to the class but only anyone proposed by the trustees and approved by the settlor<sup>5</sup>, although such a power may be considered to be void if of so wide an extent that it would be impossible for the court to say whether or not the trustees were properly exercising it, or so wide that it would be impossible for the trustees to consider in any sensible manner how they should exercise it, if at all, from time to time<sup>6</sup>. Despite this, a power to add anyone in the world (except certain specified persons) to a class of beneficiaries<sup>7</sup>, and a power to appoint to anyone in the world (except certain specified persons)<sup>8</sup>, have been held to be valid.

1 As to conceptual uncertainty see PARA 655 ante.

2 See *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce.

3 *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *Re Park, Public Trustee v Armstrong* [1932] 1 Ch 580; *Re Pugh's Will Trusts, Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262; *Blausten v IRC* [1972] Ch 256, [1972] 1 All ER 41, CA; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

4 *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *R v District Auditor No 3 Audit District of the West Yorkshire Metropolitan County Council, ex p West Yorkshire Metropolitan County Council* [1986] RVR 24, DC; but see *Metttoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.

5 *Blausten v IRC* [1972] Ch 256 at 272, [1972] 1 All ER 41 at 50, CA, per Buckley LJ.

6 *Blausten v IRC* [1972] Ch 256 at 273, [1972] 1 All ER 41 at 50, CA, per Buckley LJ.

7 *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203.

8 *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

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### **657. Discretion of trustees as to objects.**

Where several persons or objects are designated, a discretion may be given to the trustees as to which are to be benefited and in what proportions<sup>1</sup>. Property may be settled so as to give a person a determinable life interest<sup>2</sup>. This may be done by directing that the trustees are to hold the income on 'protective trusts' for the benefit of the person during his life; in such a case, a discretionary trust arises on the termination of that person's interest during his life<sup>3</sup>. Alternatively a person may be given a right to receive income until the trustees make an appointment of capital<sup>4</sup>.

1 *Page v Way* (1840) 3 Beav 20; *Re Douglas, Obert v Barrow* (1887) 35 ChD 472, CA; *Re Coleman, Henry v Strong* (1888) 39 ChD 443 at 451, CA, per Cotton LJ; *Smith v Cock* [1911] AC 317, PC.

2 See PARA 737 post.

3 See SETTLEMENTS vol 42 (Reissue) PARA 607.

4 See PARA 738 post.

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## **658. Failure to exercise discretion.**

Discretionary trusts over income remain exercisable despite the passing of time, although only in favour of such persons as would have been possible beneficiaries if the discretion had been exercised within a reasonable time<sup>1</sup>. In contrast, if powers over income are not exercised within a reasonable time, the discretion is extinguished and the beneficiaries in default of appointment become entitled<sup>2</sup>.

If the court is called upon to see to the execution of discretionary trusts, it may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution or even, should the proper basis for distribution appear, by itself directing the trustees so to distribute<sup>3</sup>.

1 *Re Locker's Settlement Trusts, Meachem v Sachs* [1978] 1 All ER 216, [1977] 1 WLR 1323.

2 *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick* [1966] 1 All ER 740, [1966] 1 WLR 499; *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203. But see *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 at [41] et seq, [2003] 2 AC 709 at [41] et seq, [2003] 3 All ER 76 at [41] et seq per Lord Walker of Gestingthorpe. See also POWERS vol 36(2) (Reissue) PARA 286.

3 *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce.

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## **E. COMPLETENESS AND VALUABLE CONSIDERATION**

### **659. Omissions which are immaterial to constitution of trust.**

A trust may be completely constituted without communication of it to the trustee or to the beneficiary<sup>1</sup>.

A trust created by will is not affected by the fact that no trustee is named, or by the fact that the trustee who is named either refuses or is unable, through death or otherwise, to act<sup>2</sup>, as the personal representatives will act as trustees. It has also been held that an *inter vivos* trust is effective despite disclaimer by the trustees<sup>3</sup>, although it would seem that no *inter vivos* trust can come into existence if based on a purported conveyance or transfer to trustees who are not named or otherwise identifiable or who are already dead<sup>4</sup>.

A trust of property does not depend on the immediate existence of a legal estate in a trustee to support it<sup>5</sup>.

A settlement of a policy of insurance is complete without notice<sup>6</sup> to the insurance office<sup>7</sup>; and a settlement of an equitable interest in stock is complete without notice to the trustees<sup>8</sup>.

1 *Fletcher v Fletcher* (1844) 4 Hare 67; *Tate v Leithead* (1854) Kay 658; *Armstrong v Timperon* (1871) 24 LT 275; *Middleton v Pollock, ex p Elliott* (1876) 2 ChD 104; *Standing v Bowring* (1885) 31 ChD 282 at 290, CA, per Lindley LJ; *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; *Re Levesley, Goodwin v Levesley* (1915) 32 TLR 145; *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJ Ch 557. Non-disclosure is, however, a circumstance from which an intention to revoke may be gathered if the settlor has reserved a power of revocation: see *Re Cozens, Green v Brisley* [1913] 2 Ch 478; *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* supra at 559. Although a trust may be completely constituted without reference to the beneficiary, the trustees may have a duty in the case of a discretionary trust to communicate with, and thereby inform themselves of the circumstances of, possible beneficiaries. For the rights of beneficiaries to disclosure of trust documents and accounts see PARA 962 post.

2 *A-G v Lady Downing* (1767) Wilm 1 at 24 per Wilmot CJ; *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81; *A-G v Stephens* (1834) 3 My & K 347; *Dodkin v Brunt* (1868) LR 6 Eq 580; *Re Smirthwaite's Trust* (1871) LR 11 Eq 251.

3 *Jones v Jones* (1874) 31 LT 535; *Mallott v Wilson* [1903] 2 Ch 494. See also *Fletcher v Fletcher* (1844) 4 Hare 67; *Re Abacus (CI) Ltd (Trustee of the Esteem Settlement), Grupo Torras SA v Al Sabah* [2003] JRC 092 at [53], [2004] WTLR 1 at [53], 6 ITELR 368 at [53], per Deputy Bailiff Birt (suggesting that the decision in *Mallott v Wilson* supra was incorrect, being inconsistent with the principle in *Milroy v Lord* (1862) 4 De GF & J 264 that there must be either a perfect transfer to a trustee or a declaration of trust by the settlor). See also Matthews 'The constitution of disclaimed trusts *inter vivos*' [1981] Conveyancer 141.

4 Such a purported trust would seem to be an ineffective incompletely constituted trust: see PARA 662 post.

5 *A-G v Lady Downing* (1767) Wilm 1 at 22; *Siggers v Evans* (1855) 5 E & B 367 at 374 per Crompton J.

6 Notice to the insurers, although not necessary to complete the settlement, is necessary to complete the title of the trustees of the settlement against the insurers and third persons: see INSURANCE vol 25 (2003 Reissue) PARA 546. It is the business of the trustees to give notice (*Re King, Sewell v King* (1879) 14 ChD 179 at 186), but notice received by the insurers otherwise than from the trustees may be sufficient (cf CHOSER IN ACTION vol 13 (2009) PARA 80).

7 *Fortescue v Barnett* (1834) 3 My & K 36; *Pearson v Amicable Assurance Office* (1859) 27 Beav 229; *Justice v Wynne* (1860) 12 L Ch R 289, CA; *Re King, Sewell v King* (1879) 14 ChD 179; but see *Ward v Audland* (1845) 8

Beav 201. As to the assignment of life insurance policies generally see INSURANCE vol 25 (2003 Reissue) PARAS 545-547 (essentials for good equitable assignment), 548-549 (statutory rights of assignee to sue for policy money), 550 (absolute assignments).

8     *Donaldson v Donaldson* (1854) Kay 711; *Voyle v Hughes* (1854) 2 Sm & G 18; *Re Way's Trusts* (1864) 2 De GJ & Sm 365 (where the settlor retained the deed in his possession and subsequently destroyed it and made a will disposing of the property).

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### **660. Cases where failure to transfer is immaterial.**

The fact that the creator of a trust does not transfer to the trustee the legal estate in the trust property which he subsequently gets in is immaterial to the effectiveness of the trust, so long as he transfers all the interest in the trust property that at the time of the creation of the trust he is in a position to transfer<sup>1</sup>. Similarly, an assignment of debts to trustees is a complete constitution of the trust, even if there is no assignment or delivery to them of the securities for the debts<sup>2</sup>. The disposer must not, however, retain a control over the property which is inconsistent with an intention to create a trust<sup>3</sup>.

1 *Gilbert v Overton* (1864) 2 Hem & M 110; *Nanney v Morgan* (1887) 37 ChD 346, CA; *Re Ralli's Will Trusts*, *Re Ralli's Marriage Settlement*, *Calvocoressi v Rodocanachi* [1964] Ch 288, [1963] 3 All ER 940; cf *Re Northcliffe*, *Arnholz v Hudson* [1925] Ch 651.

2 *Re Patrick*, *Bills v Tatham* [1891] 1 Ch 82, CA; cf *Parker v Stones* (1868) 38 LJ Ch 46.

3 See *Bizzey v Flight* (1876) 3 ChD 269.



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## **661. Consideration not necessary where trust complete.**

Where a trust has been completely constituted, it is enforced whether there has been consideration for it or not<sup>1</sup>.

Where, for example, A voluntarily covenants by deed with B to transfer property to B to hold on trust for C, it may be difficult to determine whether or not there is a completely constituted trust of the covenant itself. In principle, the answer should depend upon whether A intended to create an immediate trust of the benefit of the covenant or only intended to create a trust of the property if or when he actually transferred it to B<sup>2</sup>. Where the covenant relates to transferring money, so creating a debt, and the deed would otherwise be wholly futile, then the court may find an intention to create a trust of the covenant<sup>3</sup>. Where the covenant relates to after-acquired property and is in a deed which is otherwise fully effective, the court may find an intention only to create a trust of the property if or when actually transferred to the trustees of the deed<sup>4</sup>.

In such a case, if the trustees ask the court whether they should sue at law as covenantees, they will be directed not to sue, the maxim 'equity will not assist a volunteer' being invoked<sup>5</sup>. Equity is, however, here frustrating a volunteer suing at law, which it normally does not do<sup>6</sup>. The real reason why equity will not allow the trustees to recover damages at law may well be that, as the benefit of the covenant ex hypothesi is not held on trust for the third person, and is not held beneficially by the trustees, then it must be held on resulting trust for the settlor-covenantor who would not wish an action to be brought against himself<sup>7</sup>.

A beneficiary may now, however, be able to make a claim under the Contracts (Rights of Third Parties) Act 1999<sup>8</sup>.

1 *Jefferys v Jefferys* (1841) Cr & Ph 138; *Bentley v Mackay* (1851) 15 Beav 12; *Kekewich v Manning* (1851) 1 De GM & G 176; *Milroy v Lord* (1862) 4 De GF & J 264; *Richardson v Richardson* (1867) LR 3 Eq 686; *Henry v Armstrong* (1881) 18 ChD 668; *Paul v Paul* (1882) 20 ChD 742, CA; *Mallott v Wilson* [1903] 2 Ch 494; *Carter v Hungerford* [1917] 1 Ch 260. See also the cases cited in PARA 667 note 2 post.

2 An intention to create a trust is fundamental to the constitution of a trust: see PARAS 649-652 ante.

3 *Fletcher v Fletcher* (1844) 4 Hare 67.

4 *Re Plumptre's Marriage Settlement, Underhill v Plumptre* [1910] 1 Ch 609; *Re Pryce, Nevill v Pryce* [1917] 1 Ch 234.

5 *Re Kay's Settlement, Broadbent v Macnab* [1939] Ch 329, [1939] 1 All ER 245; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898. It is not clear what the position would be if the trustees were to choose to sue without going to the court: see Elliott 'The power of trustees to enforce covenants in favour of volunteers' (1960) 76 LQR 100; Lee 'The Public Policy of *Re Cook's Settlement Trusts*' (1969) 85 LQR 213; Barton 'Trusts and Covenants' (1975) 91 LQR 236; Meagher and Lehane 'Trusts of Voluntary Covenants' (1976) 92 LQR 427.

6 A volunteer who is a covenantor and a party to the deed can obtain full damages at law: *Cannon v Hartley* [1949] Ch 213, [1949] 1 All ER 50.

7 See Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 228.

8 See PARA 662 post. See also Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 216; and CONTRACT.



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## 662. Incomplete trusts.

Where a trust is not completely constituted, that is to say, where the settlor has not effectively declared himself trustee of specific property or has not effectively transferred property to trustees on certain trusts<sup>1</sup>, a court of equity compels its completion and execution if it has been created for valuable consideration<sup>2</sup>, but not if it is purely voluntary and without consideration<sup>3</sup>. If the settlor has not effectively transferred the property to the trustees, the court will not treat the attempted transfer as a declaration of trust by the settlor, as by attempting to transfer the property the settlor has shown an intention to divest himself of it and not to hold it himself as trustee<sup>4</sup>. Where the settlor has done all in his power, according to the nature of the property, to transfer the property to trustees (for example, by handing over a share certificate and a duly executed transfer form), the transfer will be treated as effective in equity even though something remains to be done by the transferees or a third person for the legal title to pass<sup>5</sup>.

Incomplete trusts which as regards some of the beneficiaries are for valuable consideration and as regards others are voluntary will not be enforced at the behest of the volunteers<sup>6</sup>, except where the interest of the volunteers is bound up with the interest of the other beneficiaries<sup>7</sup>. If, however, a beneficiary who is not a volunteer seeks to enforce the incomplete trust, the court will enforce it so that the trust becomes completely constituted; a volunteer beneficiary will then be able to enforce his rights under the completely constituted trust<sup>8</sup>.

The position in equity has been modified by the Contracts (Rights of Third Parties) Act 1999 where a settlor has entered into a voluntary covenant to transfer property to trustees on specified trusts<sup>9</sup>. The Act provides that a person who is not a party to a contract<sup>10</sup> may in his own right enforce a term of the contract where the term purports to confer a benefit on him<sup>11</sup>. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into<sup>12</sup>. It is provided, however, that these provisions do not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party<sup>13</sup>. There is available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract: this enables him to sue for damages and obtain substantial damages, but as a volunteer he will still be unable to obtain specific performance<sup>14</sup>. Any right or remedy of the third party that exists or is available apart from the Contracts (Rights of Third Parties) Act 1999 is unaffected by it<sup>15</sup>; and the right, if any, of the trustees to sue the settlor is likewise unaffected<sup>16</sup>.

1 *Bridge v Bridge* (1852) 16 Beav 315; *Bizzey v Flight* (1876) 3 ChD 269; *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470.

2 *Donaldson v Donaldson* (1854) Kay 711; *Lee v Lee* (1876) 4 ChD 175; *Pullan v Koe* [1913] 1 Ch 9 (covenant to settle enforced). There is valuable consideration where a party gives up something: *Hewison v Negus* (1853) 17 Jur 445 (affd (1853) 17 Jur 567); *Teasdale v Braithwaite* (1877) 5 ChD 630, CA; *Re Foster and Lister* (1877) 6 ChD 87 at 89, 96 per Jessel MR; *Schreiber v Dinkel* (1886) 54 LT 911, CA. An assignment of leaseholds to which liability is attached is for valuable consideration by reason of the relief of the assignor from the liability: *Price v Jenkins* (1877) 5 ChD 619, CA; *Harris v Tubb* (1889) 42 ChD 79. Marriage constitutes consideration for a settlement. As to such consideration and the parties within it see SETTLEMENTS vol 42 (Reissue) PARA 661 et seq; and as to valuable consideration generally see CONTRACT vol 9(1) (Reissue) PARA 727 et seq. A purported conveyance on or after 1 January 1997 of a legal estate in land to a minor is not effective to pass the legal estate, but operates as a declaration that the land is held in trust for the minor: see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 1; and see SETTLEMENTS vol 42 (Reissue) PARA 677. See also

CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 31. As to the enforcement of trusts relating to foreign immovables see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 396; and as to covenants in marriage settlements to settle after-acquired property see SETTLEMENTS vol 42 (Reissue) PARA 644 et seq.

3 *Colman v Sarrel* (1789) 1 Ves 50 at 55; *Ellison v Ellison* (1802) 6 Ves 656 at 662 per Lord Eldon LC; *Pulvertoft v Pulvertoft* (1811) 18 Ves 84 at 99; *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 149; *Jefferys v Jefferys* (1841) Cr & Ph 138; *Ward v Audland* (1845) 8 Beav 201; *Bentley v Mackay* (1851) 15 Beav 12; *Bridge v Bridge* (1852) 16 Beav 315; *Pownall v Anderson* (1856) 4 WR 407; *Dening v Ware* (1856) 22 Beav 184 at 190 per Romilly MR; *Wilkinson v Wilkinson* (1857) 4 Jur NS 47; *Walrond v Walrond* (1858) John 18; *Milroy v Lord* (1862) 4 De GF & J 264; *Lister v Hodgson* (1867) LR 4 Eq 30; *Stone v Stone* (1869) 5 Ch App 74; *Marler v Tommas* (1873) LR 17 Eq 8; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228 at 242, CA, per Cotton LJ; *Harding v Harding* (1886) 17 QBD 442 at 444, DC, per Wills J; *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470. The assignment by deed of an expectancy only operates as an agreement to assign it when realised, and therefore the creation of a trust of the expectancy, if voluntary, is not enforced: *Meek v Kettlewell* (1843) 1 Ph 342; *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697. Where, however, an expectancy is by a voluntary settlement assigned to trustees who are given power to receive and give receipts for it, and trusts are declared of any money so received, and the trustees in fact receive sums in respect of it before their authority is revoked, the trusts attach to the sums so received, and *Meek v Kettlewell* supra and *Re Ellenborough, Towry Law v Burne* supra have no application (*Re Bowden, Hulbert v Bowden* [1936] Ch 71); and, where after-acquired property has in fact been transferred to trustees under a covenant, it cannot be recovered although the covenant is unenforceable (*Re Adlard, Taylor v Adlard* [1954] Ch 29, [1953] 2 All ER 1437). In *Re Ralli's Will Trusts, Re Ralli's Marriage Settlement, Calvocoressi v Rodocanachi* [1964] Ch 288, [1963] 3 All ER 940, Buckley J was of the opinion that, if the trustees of a voluntary settlement containing a covenant to settle after-acquired property happened fortuitously to receive such property in some other capacity, eg as trustees of will trusts, then this completely constituted the trust without any further act, eg the settlor's authority. This view does, however, conflict with the ratio in *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920, which was not cited in *Re Ralli's Will Trusts, Re Ralli's Marriage Settlement, Calvocoressi v Rodocanachi* supra. A beneficiary under a pension scheme will not normally be a volunteer; his rights have been earned by service under contract as well as by contributions: *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 537, 549, [1990] 1 WLR 1587 at 1610, 1618 per Warner J; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597, [1991] 1 WLR 589; *McDonald v Horn* [1995] 1 All ER 961, CA. See also *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27, CA; *Air Jamaica Ltd v Joy Charlton* [1999] 1 WLR 1399, PC.

4 *Richards v Delbridge* (1874) LR 18 Eq 11. See also *Milroy v Lord* (1862) 4 De GF & J 264; distinguished in *Jaffa v Taylor Gallery Ltd, Jaffa v Harris* (1990) Times, 21 March.

5 *Re Rose, Rose v IRC* [1952] Ch 499 at 510, [1952] 1 All ER 1217 at 1222, CA; *Mascall v Mascall* (1984) 50 P & CR 119, CA; *Hunter v Moss* [1994] 3 All ER 215, [1994] 1 WLR 452, CA. See also *Re Fry, Chase National Executors and Trustees Corp v Fry* [1946] Ch 312, [1946] 2 All ER 106; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978. There may be circumstances where equity will intervene to prevent a donor acting in a way which is unconscionable: see *Pennington v Waine* [2002] EWCA Civ 227 at [60], [2002] 4 All ER 215 at [60], [2002] 2 BCLC 448 at [60] per Arden LJ (gift was in any event held to be perfect under the principle of benevolent construction (see *T Choithram International SA v Pagarani* [2001] 2 All ER 492, [2001] 1 WLR 1, PC; and PARA 650 ante) and alternatively the donor and auditor became the donee's agent for the purpose of delivering the transfer thus perfecting the gift; donor had completed a share transfer and given it to the company's auditors but it had not been delivered to either the donee or the company).

6 *Sutton v Chetwynd* (1817) 3 Mer 249 (affd in the House of Lords: noted at (1824) Turn & R 296); *Cormick v Trapaud* (1818) 6 Dow 60, HL; *Johnson v Legard* (1822) Turn & R 281 at 293 per Lord Eldon LC; *Gale v Gale* (1877) 6 ChD 144; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228 at 242, CA, per Cotton LJ; *Re Cameron and Wells* (1887) 37 ChD 32; *De Mestre v West* [1891] AC 264, PC; *Re Plumtre's Marriage Settlement, Underhill v Plumtre* [1910] 1 Ch 609; *Re Pryce, Nevill v Pryce* [1917] 1 Ch 234 (where, following *Re D'Angibau, Andrews v Andrews* supra, it was held that a covenant to settle after-acquired property was not enforceable for the benefit of volunteers, in this case the next of kin).

7 *Jenkins v Keymis* (1664) 1 Lev 150 (Court of Exchequer); *Jenkins v Keymes* (1668) 1 Lev 237 (in Chancery); *Newstead v Searles* (1737) 1 Atk 265; *Clayton v Earl of Wilton* (1813) 3 Madd 302 note (a); *Davenport v Bishopp* (1843) 2 Y & C Ch Cas 451 (affd (1846) 1 Ph 698); *Price v Jenkins* (1876) 4 ChD 483 at 488; *Mackie v Herbertson* (1884) 9 App Cas 303, HL; *De Mestre v West* [1891] AC 264 at 270, PC; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898. As to the persons within the marriage consideration, and as to the position where limitations not within the consideration are bound up with those which are within, see SETTLEMENTS vol 42 (Reissue) PARAS 661-662.

8 *Davenport v Bishopp* (1843) 2 Y & C Ch Cas 451; affd (1846) 1 Ph 698.

9 The Contracts (Rights of Third Parties) Act 1999 s 1 clearly applies both to a simple contract and a specialty: see s 7(3); and CONTRACT.

10     le such as a beneficiary under a trust. As to the rights of a beneficiary who is a party to the deed see *Cannon v Hartley* [1949] Ch 213, [1949] 1 All ER 50.

11     See the Contracts (Rights of Third Parties) Act 1999 s 1(1)(b); and CONTRACT.

12     See *ibid* s 1(3); and CONTRACT.

13     See *ibid* s 1(2); and CONTRACT. This would seem to leave scope for the same arguments as those considered in PARA 661 ante as to whether there is a trust of the benefit of the covenant.

14     See *Cannon v Hartley* [1949] Ch 213, [1949] 1 All ER 50. Of course, a mere promise without consideration and not by deed remains unenforceable.

15     See the Contracts (Rights of Third Parties) Act 1999 s 7(1); and CONTRACT.

16     See *ibid* s 4; and CONTRACT. As to the right of trustees to sue the settlor see PARA 661 ante.

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### **663. Valuable consideration for trust in favour of third person.**

Where an incomplete trust in favour of a third person is declared between the disposer and another for valuable consideration, performance of the trust can be enforced at the suit of the other party to the declaration, but not, in equity, at the suit of the third person<sup>1</sup>, although he may now be able to make a claim under the Contracts (Rights of Third Parties) Act 1999<sup>2</sup>.

1 *Colyear v Countess of Mulgrave* (1836) 2 Keen 81. As to the general rights and liabilities of third persons in connection with a contract see CONTRACT vol 9(1) (Reissue) PARA 748 et seq.

2 See PARA 662 ante.

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#### **664. Position where settlor obtains possession of property.**

A person who, after having made a settlement or other disposition of property which is complete in law, obtains possession of the property himself holds it in trust for the purposes of the settlement or disposition and must account for it in equity accordingly<sup>1</sup>.

<sup>1</sup> *Fortescue v Barnett* (1834) 3 My & K 36; *Fletcher v Fletcher* (1844) 4 Hare 67; *Nanney v Morgan* (1887) 37 ChD 346, CA; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82, CA.

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## **F. RECTIFICATION, DURATION, REVOCATION AND VARIATION**

### **665. Rectification on account of error.**

Where by mistake an instrument creating a trust of property does not express the disposer's intention, it may be rectified according as his true intention requires<sup>1</sup>. There is jurisdiction to rectify a voluntary settlement not only at the instance of the settlor but also at the instance of a beneficiary who is a volunteer<sup>2</sup>. The court may rectify even if the trustees or other parties to the settlement did not share the settlor's mistake<sup>3</sup>, although it would seem unlikely that the court in its discretion would rectify a settlement in the face of the reasonable opposition of a trustee who had accepted office on the faith of the settlement as executed and in ignorance of the mistake. Rectification will not, however, be decreed against the wishes of the settlor, even though it is clear that the document does not represent his wishes at the time of its execution<sup>4</sup>. Rectification may be ordered where words were intended to be used but there was a mistake as to the interpretation of the words<sup>5</sup>. It may also be ordered where it is sought to rectify a document designed to avoid inheritance tax<sup>6</sup>.

In some cases of mistake it may be appropriate to set aside the deed rather than rectify it. This may be done where there is a voluntary transaction by which one party intends to confer a bounty on another, if the court is satisfied that the disposer did not intend the transaction to have the effect which it did. It may be a mistake of law or of fact, so long as it is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it<sup>7</sup>. The equitable jurisdiction is available in circumstances where rectification is not because the beneficiaries are not parties to the relevant deed<sup>8</sup>.

1 *Thompson v Whitmore* (1860) 1 John & H 268 at 273 per Wood V-C; *Lister v Hodgson* (1867) LR 4 Eq 30; *Weir v Van Tromp* (1900) 16 TLR 531. See also EQUITY vol 16(2) (Reissue) PARA 443; MISTAKE vol 77 (2010) PARA 57 et seq. It is for the person claiming rectification to prove the existence of circumstances justifying it: *Pink v Lawrence* (1977) 36 P & CR 98, CA. As to the rectification of wills see EQUITY vol 16(2) (Reissue) PARA 444; WILLS vol 50 (2005 Reissue) PARA 408.

2 *Thompson v Whitmore* (1860) 1 John & H 268. In *Weir v Van Tromp* (1900) 16 TLR 531, however, Byrne J, while accepting that there was jurisdiction, observed that he had not been referred to any case where judgment had in fact been given in favour of reforming a voluntary settlement at the instance of a volunteer.

3 *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483.

4 *Broun v Kennedy* (1863) 33 Beav 133 at 147 (affd (1864) 4 De GJ & Sm 217); *Lister v Hodgson* (1867) LR 4 Eq 30 (see especially at 34 per Romilly MR); *Weir v Van Tromp* (1900) 16 TLR 531. However, the instrument may be rectified after the death of the disposer, if it is proved beyond all doubt that it did not express his intentions: *Lister v Hodgson* supra at 32 per Lord Romilly MR; *Weir v Van Tromp* supra; *Van der Linde v Van der Linde* [1947] Ch 306.

5 *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483. A mistake as to the material facts which led to the words used cannot be rectified (*Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA) neither can a mistake as to the consequences of the instrument (*Allnutt v Wilding* [2006] EWHC 1905 (Ch), 150 Sol Jo LB 1057, [2006] All ER (D) 375 (Jul) (affd [2007] All ER (D) 41 (Apr)). See also MISTAKE vol 77 (2010) PARA 57 et seq.

6 *Re Slocock's Will Trusts* [1979] 1 All ER 358 (a decision on capital transfer tax); cf *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913, CA; *Re Colebrook's Conveyances, Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397. It is possible to obtain rectification of a deed of variation made under the Inheritance



Tax Act 1984 s 142 (see INHERITANCE TAXATION vol 24 (Reissue) PARA 471): *Lake v Lake*[1989] STC 865; *Martin v Nicholson*[2004] EWHC 2135 (Ch), [2004] All ER (D) 95 (Jul); *Farmer v Sloan*[2004] EWHC 606 (Ch), [2004] All ER (D) 207 (Mar). As to inheritance tax see INHERITANCE TAXATION. As to rectification where income tax is in question see INCOME TAXATION.

7 *Gibbon v Mitchell*[1990] 3 All ER 338, [1990] 1 WLR 1304. As to the distinction between effect and consequences see *Wolff v Wolff*[2004] EWHC 2110 (Ch), [2004] STC 1633; *Sieff v Fox*[2005] EWHC 1312 (Ch), [2005] 3 All ER 693, [2005] 1 WLR 3811; *Allnutt v Wilding*[2006] EWHC 1905 (Ch), 150 Sol Jo LB 1057, [2006] All ER (D) 375 (Jul) (affd [2007] All ER (D) 41 (Apr)). It is for the person seeking to set aside the instrument to produce convincing evidence of the mistake: *Anker-Petersen v Christenson* [2002] WTLR 313 at 330 per Davis J. However, it is not necessary for that person to show that he would not have entered into the deed had he been properly advised: *Anker-Petersen v Christenson* supra at 335.

8 *Anker-Petersen v Christenson* [2002] WTLR 313.

## UPDATE

### 665 Rectification on account of error

NOTES 5, 7--*Allnutt*, cited, affirmed: [2007] EWCA Civ 412, [2007] WTLR 941.

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## **666. Duration.**

Certain restrictions are imposed on the duration of trusts by the rules directed against remoteness of vesting and against the creation of non-charitable trusts of perpetual or indefinite duration where the income is rendered inalienable for longer than the perpetuity period, and by the statutory restrictions on accumulations of income<sup>1</sup>. Apart from such restrictions, after it has become operative an express trust may be terminated by the subsequent failure or satisfaction of the purposes of the trust<sup>2</sup>, or by the cessation of particular circumstances for which the trust was created to provide<sup>3</sup>, or by the action of the beneficiaries if they are all ascertained and sui juris<sup>4</sup>.

1 See PARAS 684-685 post.

2 See eg *Re Gillingham Bus Disaster Fund, Bowman v Official Solicitor* [1959] Ch 62, [1958] 2 All ER 749, CA (where the objects, so far as not void for uncertainty, had been satisfied). See also *Re Abbott Fund Trusts, Smith v Abbott* [1900] 2 Ch 326. As to the circumstances in which a resulting trust arises on a failure of purposes see PARAS 711-712 post.

3 As to the extent to which the provisions of a separation deed are to be construed as limited to the period during which the separation continues see eg CONTRACT vol 9(1) (Reissue) PARA 864.

4 See PARA 750 post.

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## 667. Revocation and variation.

Where an express trust is completely constituted<sup>1</sup>, it is generally binding and irrevocable whether it was or was not constituted or declared for valuable consideration, unless a power of revocation is expressly reserved<sup>2</sup>. In order to effect a valid revocation, such a power must be exercised in the manner specifically directed<sup>3</sup>.

In certain circumstances, however, a disposition of property in trust may be set aside under the provisions relating to the avoidance of transactions at an undervalue<sup>4</sup> in bankruptcy, or under the general statutory provisions relating to dispositions in fraud of creditors<sup>5</sup>, or on the ground that the disposition was induced by fraud, duress or undue influence<sup>6</sup>. The court has wide discretionary powers conferred on it by statute to vary the terms of trusts<sup>7</sup>, besides its limited inherent jurisdiction in this respect<sup>8</sup>.

1 As to express trusts see PARA 644 et seq ante; and as to completeness see PARA 659 et seq ante.

2 *Ellison v Ellison* (1802) 6 Ves 656; *Pulvertoft v Pulvertoft* (1811) 18 Ves 84 at 99; *Ex p Pye, ex p Dubost* (1811) 18 Ves 140 at 149; *Fortescue v Barnett* (1834) 3 My & K 36; *Bill v Cureton* (1835) 2 My & K 503 at 511; *Collinson v Patrick* (1838) 2 Keen 123; *Reed v O'Brien* (1843) 7 Beav 32; *Ward v Audland* (1845) 8 Beav 201; *Bentley v Mackay* (1851) 15 Beav 12; *Smith v Hurst* (1852) 10 Hare 30 at 47 per Turner V-C; *Bridge v Bridge* (1852) 16 Beav 315 at 321-322 per Romilly MR; *Parnell v Hingston* (1856) 3 Sm & G 337; *Justice v Wynne* (1860) 12 I Ch R 289, CA; *Jones v Lock* (1865) 1 Ch App 25 at 28 per Lord Cranworth LC; *Gee v Liddell* (1866) 35 Beav 621; *Kelly v Walsh* (1878) 1 LR Ir 275; *Paul v Paul* (1882) 20 ChD 742, CA; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89 at 102-103, CA, per Cotton LJ; *Standing v Bowring* (1885) 31 ChD 282, CA; *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA. A limited power of revocation negatives the presumption of general revocability: *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJ Ch 557. As to setting aside a voluntary instrument executed by mistake see PARA 665 ante; and MISTAKE vol 77 (2010) PARA 54. As to the alteration or revocation of trusts for creditors see PARA 668 post.

3 *Lane v Debenham* (1853) 11 Hare 188 at 192. A power to revoke the trusts of a settlement with the consent of a judge of the Chancery Division is invalid, as a private individual cannot impose upon a judge the jurisdiction or duty to adjudicate on a matter: *Re Hooker's Settlement, Heron v Public Trustee* [1955] Ch 55, [1954] 3 All ER 321; and see *Re H's Settlement, H v S* [1939] WN 318; *Anthony v Danges* [1998] 2 FLR 775.

4 See the Insolvency Act 1986 ss 339, 341, 342 (ss 339, 342 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq.

5 See ibid ss 423-425 (ss 423, 424 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 663 et seq. For an example of a trust void under s 423(2) see *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489, [2002] WTLR 1027. See also *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542, [2007] 1 All ER 1106.

6 See PARA 680 post.

7 Such powers are conferred principally by the Variation of Trusts Act 1958 s 1 (as amended): see PARA 1062 et seq post. Certain powers of variation are also given to the court by the Trustee Act 1925 s 57: see PARA 1061 post. See also the Matrimonial Causes Act 1973 s 24 (as substituted and amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq.

8 See PARA 1060 post.

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## 668. Trusts for creditors.

If a debtor conveys property in trust for the benefit of his creditors who are not parties to the conveyance and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustee to apply the property in satisfying their claims; and, in as much as the debtor himself is in fact the only beneficiary<sup>1</sup>, is revocable by him before the property is so applied, and cannot be enforced by the creditors<sup>2</sup>. A trust in favour of creditors is, however, irrevocable if the creditors are parties to or assent to the conveyance<sup>3</sup>, or if the fact of its execution is communicated to them<sup>4</sup>. The trust is also irrevocable and enforceable by the creditors if it is not to take effect until after the debtor's death<sup>5</sup>, or if it is followed by a further trust in favour of other beneficiaries<sup>6</sup>.

Certain deeds of arrangement for the benefit of creditors require to be registered, otherwise they will be void<sup>7</sup>. Moreover, if such a deed of arrangement is for the benefit of creditors generally, it will be void unless assented to by a majority of creditors in the proper manner<sup>8</sup>. A deed of arrangement affecting land, other than registered land<sup>9</sup>, is void against a purchaser of the land unless it is registered in the register of deeds of arrangement at the Land Registry<sup>10</sup>. A deed of arrangement affecting registered land must be registered to be effective and a purchaser will not be concerned with or affected by any deed of arrangement which is not so protected<sup>11</sup>.

1 *Bill v Cureton* (1835) 2 My & K 503 at 511 per Pepys MR.

2 *Wallwyn v Coutts* (1815) 3 Mer 707; *Garrard v Lord Lauderdale* (1830) 3 Sim 1; *Acton v Woodgate* (1833) 2 My & K 492; *La Touche v Earl of Lucan* (1840) 7 Cl & Fin 772, HL; *Bateman v Margerison* (1848) 6 Hare 496; *Mackinnon v Stewart* (1850) 1 Sim NS 76; *Synnot v Simpson* (1854) 5 HL Cas 121 at 133-134 per Lord Cranworth LC; *Henriques v Bensusan, Bank of England Claim* (1872) 20 WR 350; *Johns v James* (1878) 8 ChD 744, CA; *Re Sanders' Trusts* (1878) 47 LJ Ch 667; *Henderson v Rothschild & Sons* (1887) 56 LJ Ch 471, CA; *Re Ashby, ex p Wreford* [1892] 1 QB 872; *R v Humphris* [1904] 2 KB 89, CCR. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 861; GIFTS vol 52 (2009) PARA 258. In executing such a conveyance the debtor is merely directing the mode in which his own property is to be applied for his own benefit (*Garrard v Lord Lauderdale* supra at 12 per Shadwell V-C), and the conveyance has the same effect as if the debtor had delivered money to an agent to pay his creditors, in which case he might recall the money before the agent had made any payment or communication to them (*Acton v Woodgate* supra at 495 per Leach MR; *Synnot v Simpson* supra at 133; cf *Hughes v Stubbs* (1842) 1 Hare 476; *Lawrence v Campbell* (1859) 7 WR 170). The question whether the trusts of the conveyance can be revoked, altered or modified depends upon the circumstances of each particular case: *Smith v Hurst* (1852) 10 Hare 30 at 47 per Turner V-C. A conveyance upon trust to make good breaches of trust committed by the disposer in respect of certain trust estates has been held to be irrevocable, being a trust for particular persons, not for general creditors (*New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA); in such a case the disposer becomes a constructive trustee of the money misapplied which he is bound to invest for the trust, and the relationship is not merely that of debtor and creditor (*Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJ Ch 557). As to when a conveyance ostensibly in trust for the benefit of creditors will be set aside as fraudulent see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 663 et seq; as to the effect of time on a trust for creditors see LIMITATION PERIODS vol 68 (2008) PARA 1153; and as to assignments for the benefit of creditors generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 859 et seq.

3 *Field v Lord Donoughmore* (1841) 1 Dr & War 227; *Mackinnon v Stewart* (1850) 1 Sim NS 76; *Nicholson v Tutin* (1855) 2 K & J 18; *Siggers v Evans* (1855) 5 E & B 367; *Montefiore v Browne* (1858) 7 HL Cas 241; *Wild v Banning* (1866) LR 2 Eq 577. See also GIFTS vol 52 (2009) PARA 258. It is not necessary that the creditors should actually execute the deed if they otherwise express their assent to it: *Field v Lord Donoughmore* supra at 228 per Sugden LC; *Gould v Robertson* (1851) 4 De G & Sm 509; *Re Baber's Trusts* (1870) LR 10 Eq 554. A creditor will, however, take no benefit under the deed if he deviates from and disturbs the arrangement made by it

(*Field v Lord Donoughmore* supra at 229 per Lord Sugden LC), or if he is guilty of undue delay in taking advantage of it (*Field v Lord Donoughmore* supra; *Gould v Robertson* supra; but see *Nicholson v Tutin* supra).

4 *Acton v Woodgate* (1833) 2 My & K 492 at 495 per Leach MR; *Browne v Cavendish*, *Cavendish v Browne* (1844) 1 Jo & Lat 606 at 635-636 per Sugden LC; *Harland v Binks* (1850) 15 QB 713; *Synnot v Simpson* (1854) 5 HL Cas 121 at 138-139 per Lord Cranworth LC; *Henderson v Rothschild & Sons* (1886) 33 ChD 459 at 469 per Bacon V-C; *Adnitt v Hands* (1887) 57 LT 370, DC; *Re Sanders' Trusts* (1878) 47 LJ Ch 667. The communication may have induced the creditors to refrain from steps which they would have otherwise taken to enforce their claims: *Acton v Woodgate* supra at 495. Where, however, a person on going abroad conveyed property upon trust for its general management, including payment of his debts, the communication to his creditors of the existence of the deed was held not to constitute them beneficiaries under it: *Cornthwaite v Frith* (1851) 4 De G & Sm 552; and see *Re Michael, ex p Michael* (1891) 8 Morr 305, DC. See also *Mackinnon v Stewart* (1850) 1 Sim NS 76; *Montefiore v Browne* (1858) 7 HL Cas 241.

5 *Synnot v Simpson* (1854) 5 HL Cas 121 at 139 per Lord Cranworth LC; *Re Fitzgerald's Settlement*, *Fitzgerald v White* (1887) 37 ChD 18, CA. See also GIFTS vol 52 (2009) PARA 258.

6 *Godfrey v Poole* (1888) 13 App Cas 497, PC; *Priestley v Ellis* [1897] 1 Ch 489.

7 See the Deeds of Arrangement Act 1914 ss 1, 2 (s 2 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 859 et seq.

8 See *ibid* s 3 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 865.

9 See the Land Charges Act 1972 s 7; and LAND CHARGES vol 26 (2004 Reissue) PARA 662 et seq. As to registered land see generally LAND REGISTRATION.

10 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 870; LAND CHARGES vol 26 (2004 Reissue) PARA 664. As to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1064 et seq.

11 See the Land Registration Act 2002 s 87; the Land Registration Rules 2003, SI 2003/1417, r 93; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 870; LAND REGISTRATION vol 26 (2004 Reissue) PARAS 1009, 1019-1020. A deed of arrangement cannot be protected by a notice, nor can it take effect as an unregistered interest which overrides registration; it must be protected by a restriction: see the Land Registration Act 2002 s 87(2)(a), (3); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1020.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(ii) Executory Trusts/669. Construction.

## (ii) Executory Trusts

### 669. Construction.

An executory trust, where the declaration of trust is in the form of a direction to create by a subsequent instrument certain trusts not defined with absolute precision by the disposer<sup>1</sup>, is not construed according to the legal effect of the language used, as an executed trust would be<sup>2</sup>, but is generally<sup>3</sup> construed so as best to give effect to the apparent intention of the disposer<sup>4</sup>. Equity will modify any inapt provision<sup>5</sup>.

1 As to the distinction between executed and executory trusts generally see PARA 626 ante.

2 See PARAS 649-652 ante.

3 See, however, PARA 671 post.

4 1 Fearne's Contingent Remainders (10th Edn) 136 et seq; *Leonard v Earl of Sussex* (1705) 2 Vern 526; *Papillon v Voice* (1728) 2 P Wms 471; *Lord Glenorchy v Bosville* (1733) Cas temp Talb 3; *Wright v Pearson* (1758) 1 Eden 119; *Austen v Taylor* (1759) 1 Eden 361 at 366; *Lecky v Knox* (1809) 1 Ball & B 210 at 215; *Blackburn v Stables* (1814) 2 Ves & B 367; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559; *M'Guire v Scully* (1829) Beat 370 at 378; *Stonor v Curwen* (1832) 5 Sim 264; *Phillips v James* (1865) 13 WR 934; *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543; *Cogan v Duffield* (1876) 2 ChD 44, CA; *Hastie v Hastie* (1876) 2 ChD 304, CA; *Re Parrott, Walter v Parrott* (1886) 33 ChD 274, CA; *Nash v Allen* (1889) 42 ChD 54; *Re Ballance, Ballance v Lanphier* (1889) 42 ChD 62; *Re Flavel's Will Trusts, Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444; and see *Davis v Richards & Wallington Industries Ltd* [1991] 2 All ER 563, [1990] 1 WLR 1511. Where the assistance of the trustees, which is ultimately the assistance of the court of equity having jurisdiction in the matter, is necessary to complete the limitations expressed in the declaration of trust, the fact that the limitations were not completely declared by the disposer is sufficient evidence of his intention that they should be further modelled; but, where they have been completely declared by the disposer, there is no authority for interfering and making them different: *Austen v Taylor* supra at 368-369 per Henley, Lord Keeper. As to the general rules of interpretation of deeds and non-testamentary instruments see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq; and as to wills see WILLS vol 50 (2005 Reissue) PARA 481 et seq.

5 *Re Ballance, Ballance v Lanphier* (1889) 42 ChD 62 at 65 per Kay J.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(ii) Executory Trusts/670. Object and limitation of interests.

### **670. Object and limitation of interests.**

An executory trust may be declared for an object not at the time in existence<sup>1</sup>.

In instruments coming into effect after 31 December 1925, an expression could not operate in equity so as to create an entailed interest in any real or personal property unless it would have been effectual for that purpose in a deed, not being an executory instrument, coming into operation before 1 January 1926<sup>2</sup>. It has not been possible to create an entailed interest in real or personal property since 31 December 1996<sup>3</sup>.

So far as possible, executory trusts are moulded by the court so as to carry out the disposer's intention without infringing the rule against perpetuities<sup>4</sup>.

1 *A-G v Lady Downing* (1769) Amb 550 at 571-572.

2 See the Law of Property Act 1925 s 130(2) (repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; para 605 note 7 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 105; SETTLEMENTS vol 42 (Reissue) PARA 677.

4 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1032.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(ii) Executory Trusts/671. Addition of ancillary trusts and powers.

### **671. Addition of ancillary trusts and powers.**

In creating the trusts directed by the disposer, equity may direct the insertion of such ancillary trusts and powers as may be necessary to effect his intention even though they may not have been expressly contemplated by him<sup>1</sup>.

<sup>1</sup> *Earl of Stamford v Hobart* (1710) 3 Bro Parl Cas 31, HL; *Horne v Barton* (1815) 19 Ves 398; *Brewster v Angell* (1820) 1 Jac & W 625; *Elton v Elton (No 2)* (1860) 27 Beav 634. The trustees will be treated as trustees under the Settled Land Act 1925: see *Re Garnett Orme and Hargreaves' Contract* (1883) 25 ChD 595; and SETTLEMENTS vol 42 (Reissue) PARA 750.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/672. Creation of secret trusts.

### **(iii) Secret Trusts**

#### **672. Creation of secret trusts.**

Secret trusts have commonly been regarded as a product of the principle that equity does not allow the statute which requires certain written formalities for the creation of interests in land to be used as an instrument of fraud<sup>1</sup>. More recent cases<sup>2</sup>, however, appear to establish that there is no conflict with the Wills Act 1837 since the trust operates outside or, as it is said, *dehors* the will. Where the will is executed in proper form, X will be able to establish his legal title to the property; but, if the intention of the testator has been communicated to X by the testator in his lifetime, and X has acquiesced, his conscience will be bound in equity and he will be compelled to hold the property on trust for the persons or purposes indicated by the testator<sup>3</sup>. This trust is not regarded as a testamentary disposition coming within the Wills Act 1837 but as a trust within the ordinary equity jurisdiction.

A secret trust is a trust which a court of equity, proceeding on the ground of fraud, imposes on a person who has obtained title to property, for example by a gift by will<sup>4</sup>, obliging him to hold it for the benefit of the persons for whom or purposes for which he knew that it was given or allowed to pass to him<sup>5</sup>. A fully secret trust arises where a testator gives property to a person apparently beneficially, but has communicated to that person during his lifetime certain trusts on which the property is to be held<sup>6</sup>. A half secret trust which will be enforced by the court arises where the fact that the property is given to the legatee upon trust is mentioned in the will but the trusts are not defined by the will<sup>7</sup>. If the will defines the trusts by reference to an earlier document, for example a letter, then the probate doctrine of incorporation by reference applies to treat the trusts of the earlier document as if set out in the will<sup>8</sup>.

In order that there should be a valid fully secret trust, the testator's intention must be communicated to the donee during the testator's lifetime<sup>9</sup>, whereas in the case of a half secret trust the communication must be prior to, or contemporaneous with, the will<sup>10</sup>.

Uncommunicated wishes or expectations of the testator, even though written, are not sufficient<sup>11</sup>. A person may accept a secret trust either expressly or by silently acquiescing in it when communicated to him<sup>12</sup>.

If the trustee of a fully secret trust renounces or dies in the testator's lifetime, the trust cannot operate<sup>13</sup>. If such an event occurs in relation to a half secret trust, equity will not allow the trust appearing on the face of the will to fail for want of a trustee, and therefore the personal representatives will hold on the half secret trusts if the terms of such trusts can be ascertained despite the trustee's death<sup>14</sup>.

In either sort of secret trust, it seems that disclaimer after the testator's death will not invalidate the trust<sup>15</sup>.

<sup>1</sup> As to the principle that equity does not allow a statute to be made an instrument of fraud see EQUITY vol 16(2) (Reissue) PARAS 563-564.

<sup>2</sup> *Re Snowden, Smith v Spowage*[1979] Ch 528, [1979] 2 All ER 172; *Re Gardner, Huey v Cunningham*[1923] 2 Ch 230; *Re Young, Young v Young*[1951] Ch 344, [1950] 2 All ER 1245.

3 See eg *Cullen v A-G for Ireland*(1866) LR 1 HL 190; *Blackwell v Blackwell*[1929] AC 318, HL. There will, of course, be no secret trust if the evidence shows that the testator intended to impose not a binding obligation, but a mere moral obligation on the alleged secret trustee: see *Kasperbauer v Griffith* [2000] WTLR 333, CA.

4 Although secret trusts usually have arisen in connection with gifts by will, the principle also applies where the owner of property refrains from making a will and so allows the property to pass as on an intestacy and perhaps to gifts made by settlement inter vivos: *Re Gardner, Huey v Cunningham* [1923] 2 Ch 230 at 233 per Romer J; *Re Tyler's Fund Trusts, Graves v King*[1967] 3 All ER 389, [1967] 1 WLR 1269 (doubted by Pennycuik J as to inter vivos dispositions); *Nichols v IRC*[1973] 3 All ER 632, [1974] 1 WLR 296 (affd [1975] 2 All ER 120, [1975] 1 WLR 534, CA). See also PARA 675 post.

5 See *McCormick v Grogan*(1869) LR 4 HL 82 at 88, 97; *Re Fleetwood, Sidgreaves v Brewer*(1880) 15 ChD 594 at 607; *Blackwell v Blackwell*[1929] AC 318 at 325, 335, 341, HL; *Re Young, Young v Young*[1951] Ch 344, [1950] 2 All ER 1245; *Re Snowden, Smith v Spowage*[1979] Ch 528, [1979] 2 All ER 172. See also EQUITY vol 16(2) (Reissue) PARAS 563-564; WILLS vol 50 (2005 Reissue) PARAS 509-511.

6 See PARA 673 et seq post.

7 *Blackwell v Blackwell*[1929] AC 318, HL. In such a case, although there may be no question of personal fraud on the part of the legatee, who in any case takes in a fiduciary capacity, it may be a fraud on the testator for the legatee to refuse to carry out the trust, and the residuary legatees cannot take advantage of and make themselves parties to such a fraud: *Blackwell v Blackwell* supra at 341-342.

8 *Re Edwards' Will Trusts, Dalglish v Leighton*[1948] Ch 440, [1948] 1 All ER 821, CA; *Re Schintz's Will Trusts, Lloyds Bank Ltd v Moreton*[1951] Ch 870, [1951] 1 All ER 1095.

9 *Lomax v Ripley* (1855) 3 Sm & G 48; *Juniper v Batchelor* (1868) 19 LT 200; *Rowbotham v Dunnett*(1878) 8 ChD 430 at 439; *Re Boyes, Boyes v Carritt*(1884) 26 ChD 531; *Re King's Estate* (1888) 21 LR Ir 273 at 277; *Ottaway v Norman*[1972] Ch 698, [1971] 3 All ER 1325.

10 *Re Keen, Evershed v Griffiths*[1937] Ch 236, [1937] 1 All ER 452, CA; *Re Bateman's Will Trusts, Brierley v Perry*[1970] 3 All ER 817, [1970] 1 WLR 1463. In Australia, however, the courts have refused to apply the English rule and have held that a half secret trust can be communicated at any time before the testator's death, as in the case of a fully secret trust: *Legerwood v Perpetual Trustee Co Ltd* (1997) 41 NSWLR 532. Moreover, the English courts have refused to apply the rule to the analogous case of nomination under a life insurance policy: *Gold v Hil*[1999] 1 FLR 54.

11 *Wallgrave v Tebbs* (1855) 2 K & J 313; *Carter v Green* (1857) 3 K & J 591; *McCormick v Grogan*(1869) LR 4 HL 82; *Littledale v Bickersteth* (1876) 24 WR 507; *Scott v Brownrigg* (1881) 9 LR Ir 246; *Re King's Estate* (1888) 21 LR Ir 273 at 277.

12 *Paine v Hall* (1812) 18 Ves 475; *Lomax v Ripley* (1855) 3 Sm & G 48 at 73 per Stuart V-C; *Tee v Ferris* (1856) 2 K & J 357 at 363-364; *Jones v Badley*(1868) 3 Ch App 362, CA; *Springett v Jennings*(1870) LR 10 Eq 488 (on appeal (1871) 6 Ch App 333); *Rowbotham v Dunnett*(1878) 8 ChD 430; *Re King's Estate* (1888) 21 LR Ir 273 at 277 per Monroe J; *Ottaway v Norman*[1972] Ch 698, [1971] 3 All ER 1325.

13 *Re Maddock, Llewelyn v Washington*[1902] 2 Ch 220 at 231, CA, per Cozens-Hardy LJ; contra *Blackwell v Blackwell*[1929] AC 318 at 328, HL, per Lord Buckmaster.

14 Cf *Mallott v Wilson*[1903] 2 Ch 494.

15 See *Blackwell v Blackwell*[1929] AC 318 at 328, HL, per Lord Buckmaster, and at 341 per Lord Warrington of Clyffe.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/673. Evidence to establish a secret trust and effect of establishment.

### **673. Evidence to establish a secret trust and effect of establishment.**

The evidence establishing a secret trust must be clear and distinct<sup>1</sup>. Where the existence of a secret trust is admitted, the donee<sup>2</sup>, or even his solicitor<sup>3</sup>, may be compelled to give evidence of its terms, and, if it is not admitted by the donee, it may be proved by other means<sup>4</sup>.

Where a testator makes or leaves unrevoked a devise or bequest on the faith of a promise, whether express or tacit, on the donee's part that he will carry out the testator's intentions and the gift is on the face of it absolute, equity will admit evidence as to the testator's intentions and as to the communication of them to, and the acquiescence of, the donee; and will compel the donee, as being a trustee, to carry out the testator's intentions<sup>5</sup>, unless they are such as are prohibited by law<sup>6</sup>. Where no fully secret trust is established, the donee is entitled beneficially<sup>7</sup>.

Where it appears from the face of a will that the donee was only intended to take as a trustee<sup>8</sup>, extrinsic evidence of the objects of the trust is admissible<sup>9</sup>.

Where a person has fraudulently induced a conveyance of land, extrinsic evidence is admissible to show that he holds upon a trust and to show the trust upon which he holds, as the exclusion of such evidence would result in the effectuation of a fraud<sup>10</sup>.

1 *McCormick v Grogan* (1869) LR 4 HL 82. As to the requirement of clear and cogent evidence to establish the existence of a secret trust: see *Day v Day* [2005] EWHC 1455 (Ch) at [51], [2005] All ER (D) 268 (Jun) at [51] per Deputy Judge Launcelot Henderson QC. According to Megarry V-C in *Re Snowden, Smith v Spowage* [1979] Ch 528 at 537, [1979] 2 All ER 172 at 179, the standard of proof is the ordinary standard of proof in civil cases (not following *Ottaway v Norman* [1972] Ch 698 at 712, [1971] 3 All ER 1325 at 1330, where the higher standard applicable to rectification of deeds had been suggested by Brightman J), although, if personal fraud on the legatee's part were involved, a higher standard of proof would be required, as for civil claims based on fraud. Thus it may be that, if the intention to create a trust has been proved on the balance of probabilities, proof at a higher standard is required if the existence of that trust would reveal the legatee to be fraudulent. See also *Margulies v Margulies* [2000] All ER (D) 344, 2 ITELR 641, CA; *Davis v Davis* [2001] All ER (D) 352 (May). See further *R v Fuller* [2005] EWCA Crim 825, [2006] WTLR 863, [2005] All ER (D) 258 (Apr) (the court inferred an interest under a secret trust to allow a confiscation order to be made following a money laundering conviction).

2 *Stickland v Aldridge* (1804) 9 Ves 516; cf *Muckleston v Brown* (1801) 6 Ves 52. See also note 5 infra.

3 *Russell v Jackson* (1851) 9 Hare 387.

4 *Edwards v Pike* (1759) 1 Eden 267.

5 *Wallgrave v Tebbs* (1855) 2 K & J 313; *Moss v Cooper* (1861) 1 John & H 352; *Jones v Badley* (1868) 3 Ch App 362, CA; *McCormick v Grogan* (1869) LR 4 HL 82. Where a deceased spouse has bequeathed property to the surviving spouse and it is sought to establish a secret trust in favour of a particular person, the surviving spouse may be compelled to give evidence as to communications made between the spouses during their marriage: *Shenton v Tyler* [1939] Ch 620, [1939] 1 All ER 827, CA.

6 *Muckleston v Brown* (1801) 6 Ves 52; *Stickland v Aldridge* (1804) 9 Ves 516; *Russell v Jackson* (1852) 10 Hare 204; *Tee v Ferris* (1856) 2 K & J 357; *Springett v Jennings* (1871) 6 Ch App 333; *Rowbotham v Dunnnett* (1878) 8 ChD 430. As to trusts prohibited by law see PARA 678 et seq post.

7 See PARA 676 post.

8 As to the circumstances in which undefined trusts are enforceable see PARA 677 post.

9 *Blackwell v Blackwell* [1929] AC 318, HL. See also *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 ChD 594; *Re Huxtable, Huxtable v Crawford* [1902] 2 Ch 793, CA; *Re Young, Young v Young* [1951] Ch 344, [1950] 2 All ER 1245; and PARA 677 text and note 7 post.

10 *Booth v Turler* (1873) LR 16 Eq 182; *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133; *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA (foreign land). The principle also applies where, although the conveyance itself is not fraudulently obtained, fraud arises in setting up the absolute character of the conveyance to defeat the beneficial interest: *Bannister v Bannister* [1948] 2 All ER 133, CA; *Lys v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044; cf *Dillwyn v Llewelyn* (1862) 4 De GF & J 517.

## **UPDATE**

### **673 Evidence to establish a secret trust and effect of establishment**

NOTE 1--See *Davies v Revenue and Customs Comrs* [2009] UKFTT 138 (TC), [2009] WTLR 1151 (no evidence of secret trust).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/674. Gifts to several on secret understanding with one.

#### **674. Gifts to several on secret understanding with one.**

The tacit or explicit acceptance of a trust by one of several tenants in common does not affect the others to whom no communication of the testator's intention has been made<sup>1</sup>. Where, however, there is a gift to two or more persons as joint tenants and the gift is made on the antecedent promise of some but not all of the donees, all are bound<sup>2</sup>. Where a gift to two or more persons as joint tenants is left unrevoked on the faith of the subsequent promise of some but not all of the donees, only those who gave the promise are bound<sup>3</sup>.

1 *Tee v Ferris* (1856) 2 K & J 357; *Rowbotham v Dunnnett* (1878) 8 ChD 430 at 437; *Re Stead, Witham v Andrew* [1900] 1 Ch 237 at 241 per Farwell J. See also *Geddis v Semple* [1903] 1 IR 73. The reason is that otherwise one beneficiary, by setting up a secret trust, could deprive the rest of their benefits: *Tee v Ferris* supra at 368; *Re Stead, Witham v Andrew* supra at 241.

2 *Russell v Jackson* (1852) 10 Hare 204; *Jones v Badley* (1868) 3 Ch App 362, CA; *Re Stead, Witham v Andrew* [1900] 1 Ch 237 at 240-241 per Farwell J; *Re Young, Young v Young* [1951] Ch 344, [1950] 2 All ER 1245. The reason is that no person can claim an interest under a fraud committed by another: *Re Stead, Witham v Andrew* supra at 241.

3 *Burney v Macdonald* (1845) 15 Sim 6; *Moss v Cooper* (1861) 1 John & H 352; *Re Stead, Witham v Andrew* [1900] 1 Ch 237 at 241 per Farwell J. The reason is that the gift is not tainted with any fraud in procuring the execution of the will: *Re Stead, Witham v Andrew* supra at 241. It may be argued that the authorities can be construed so that, if the gift to one was actually induced by the other's promise to the testator, then that one is bound but not otherwise: see Perrins 'Can you Keep Half a Secret?' (1972) 88 LQR 225.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/675. Secret trusts in relation to intestacies, joint property and powers of appointment.

### **675. Secret trusts in relation to intestacies, joint property and powers of appointment.**

Where a person refrains from disposing of property by his will in reliance on a promise to deal with the property in accordance with the disclosed intentions of the potential testator, given by a person who at the date of the promise would, if he survived the potential testator, be entitled to the property by reason of the intestacy of the potential testator, that other person and those claiming under him will be required to give effect to those intentions<sup>1</sup>. In such a case it has been held that, when the property in fact devolves upon that person by reason of the intestacy, he is, and those claiming under him are, in the same position as if immediately after the promise he had executed a declaration of trust binding himself to hold any property coming to him by reason of the intestacy upon the trusts communicated to him by the deceased; and, accordingly, a gift to a beneficiary under those trusts does not fail by reason of the death of the beneficiary after the communication but before the death of the potential testator<sup>2</sup>. This overlooks the point that there cannot be a valid declaration of trust of a mere hope of acquiring property in the future<sup>3</sup>. The secret trust is only completely constituted on the death of the potential testator intestate, so a predeceasing beneficiary's interest should, in principle, lapse<sup>4</sup>.

Where a general power of appointment by the exercise of which a tenant for life could defeat the interests of certain remaindermen is reinstated, for example by revocation of a codicil, upon the promise of the donee of the power not to exercise it so as to defeat the interests of those remaindermen, an appointment by the donee which results in the defeat of those interests will not be allowed by the court to stand and is wholly invalid and inoperative<sup>5</sup>.

Where an interest in property held as beneficial joint tenant passes to the surviving joint tenant who has accepted a trust to deal with the interest in accordance with instructions, the surviving joint tenant will be required to give effect to those instructions<sup>6</sup>.

1 *Re Gardner, Huey v Cunningham* [1920] 2 Ch 523, CA.

2 *Re Gardner, Huey v Cunningham* [1923] 2 Ch 230. The same reasoning, it is conceived, applies where there is a gift by will and a beneficiary under the secret trust dies in the lifetime of the testator.

3 *Williams v IRC* [1965] NZLR 395, NZ CA. See also *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *Re Northcliffe, Arnholz v Hudson* [1925] Ch 651; and PARA 654 ante.

4 As to the lapse of gifts by will see WILLS vol 50 (2005 Reissue) PARA 450 et seq.

5 *Tharp v Tharp* [1916] 1 Ch 142 at 151-153 per Neville J; on appeal [1916] 2 Ch 205, CA. See also POWERS vol 36(2) (Reissue) PARA 366.

6 *Healey v Brown* [2002] EWHC 1405 (Ch), [2002] WTLR 849, 4 ITELR 894.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/676. Fully secret trusts where the donee takes absolutely.

### **676. Fully secret trusts where the donee takes absolutely.**

Where, in the case of a gift which is on the face of it absolute, the intended secret trusts cannot take effect or are not communicated to the donee or are not assented to by him, the donee holds for his own benefit<sup>1</sup>. Similarly, where the trusts relate to part only of the gift, the donee takes absolutely subject to the performance of the trusts, the benefits under the trusts being treated as legacies carrying interest at the rate of six per cent per annum from the first anniversary of the testator's death<sup>2</sup>.

If a testator gives property to his executors with the request that they will dispose of it in accordance with any memorandum signed by him, and directs that any such memorandum is not to form part of his will or to have any testamentary character and that the expression of his wishes, even if communicated in his lifetime, is not to create a trust or legal obligation, the executors take absolutely, the bargain between them and the testator being that they should so take<sup>3</sup>.

1 *Jones v Badley* (1868) 3 Ch App 362, CA; *McCormick v Grogan* (1869) LR 4 HL 82; *Re Downing's Residuary Estate* (1888) 60 LT 140; *Re Pitt Rivers, Scott v Pitt Rivers* [1902] 1 Ch 403, CA (where a testator who had established and maintained a museum and park for the benefit of the public devised it and an annuity of £300 for maintenance to his son, intending his son to allow the public access as before, and the son accepted the devise, and it was held that there was no enforceable trust on the ground that the testator intended no rights to be acquired by the public). See also *Lomax v Ripley* (1855) 3 Sm & G 48; *Baldwin v Baldwin* (1856) 22 Beav 413; *Wheeler v Smith* (1859) 29 LJ Ch 194.

2 *Irvine v Sullivan* (1869) LR 8 Eq 673.

3 *Re Falkiner, Mead v Smith* [1924] 1 Ch 88 (distinguishing *Re Spencer's Will* (1887) 3 TLR 822, CA); *Re Stirling, Union Bank of Scotland Ltd v Stirling* [1954] 2 All ER 113, [1954] 1 WLR 763. See also *Re Schar, Midland Bank Executor and Trustee Co Ltd v Damer* [1951] Ch 280, [1950] 2 All ER 1069.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iii) Secret Trusts/677. Half secret trusts where the will refers to but does not define the trusts.

### **677. Half secret trusts where the will refers to but does not define the trusts.**

Where property is given by will to persons upon trusts which are referred to in, but undefined by, the will, the trustees cannot take beneficially<sup>1</sup>, and the question whether the trustees hold the property in trust for the persons claiming under the undefined trusts, or in trust for the residuary legatees of the testator or the persons entitled on the footing of an intestacy, as the case may be, has been the subject of many judicial decisions<sup>2</sup>. It is, however, now settled<sup>3</sup> that trusts which are referred to in, but are not defined by, the will are enforceable if, but only if:

- 45 (1) they are described in the will as having been defined and communicated prior to or contemporaneously with the will<sup>4</sup>; and
- 46 (2) it is proved that they were so defined and were so communicated in accordance with the terms of the will<sup>5</sup>.

If in a will the reference to the undefined trusts is not restricted to trusts defined and communicated prior to or contemporaneously with the will, the trusts are unenforceable, for a testator cannot confer on himself the power of making future unwitnessed testamentary dispositions by naming trustees and leaving the objects of the trusts to be supplied afterwards<sup>6</sup>.

Oral evidence is not allowed to contradict the will, and therefore a legatee appearing as trustee on the face of the will cannot produce evidence to show that he was intended to take some of the legacy beneficially<sup>7</sup>.

There is no general agreement as to whether secret trusts are express or constructive<sup>8</sup>. One view is that both fully secret and half secret trusts are express trusts, being based on the express intention of the testator communicated to and acquiesced in by the secret trustee. On this basis it has been held<sup>9</sup> that a half secret trust must comply with the statutory formalities<sup>10</sup>. More recently a fully secret trust of land was apparently held to be a constructive trust<sup>11</sup> and held valid on parol evidence<sup>12</sup>.

1 See eg *Re Boyes*, *Boyes v Carritt* (1884) 26 ChD 531.

2 If it appears from the face of the will that the donee was intended to take only as a trustee and not beneficially, a resulting trusts arises, if the objects of the trust are not established, in favour of the persons who would have been entitled to the subject matter of the gift if the will had contained no such disposition in favour of the donee: *Ommanney v Butcher* (1823) Turn & R 260 at 270. See also *Re Pugh's Will Trusts*, *Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262.

3 *Blackwell v Blackwell* [1929] AC 318, HL, in which the decision of Hall V-C in *Re Fleetwood*, *Sidgreaves v Brewer* (1880) 15 ChD 594 (as to the correctness of which Lord Dunedin and Lord Parker in *Le Page v Gardom* (1915) 84 LJ Ch 749 at 752-753, HL, and Warrington LJ in *Re Gardner*, *Huey v Cunningham* [1920] 2 Ch 523 at 532, CA, reserved their opinions) was followed, and the decision in *Re Huxtable*, *Huxtable v Crawford* [1902] 2 Ch 793, CA, was treated as following that in *Re Fleetwood*, *Sidgreaves v Brewer* supra.

4 *Re Keen*, *Evershed v Griffiths* [1937] Ch 236, [1937] 1 All ER 452, CA. See also *Johnson v Ball* (1851) 5 De G & Sm 85. Cf *Blackwell v Blackwell* [1929] AC 318 at 339, 342, HL; *Re Cooper*, *Le Neve-Foster v National Provincial Bank Ltd* [1939] Ch 811, [1939] 3 All ER 586, CA (where the original legacy given on the secret trusts was increased by a later will, and the increase was not communicated); *Re Schintz's Will Trusts*, *Lloyds Bank Ltd v Moreton* [1951] Ch 870, [1951] 1 All ER 1095.



5 *Re Keen, Evershed v Griffiths* [1937] Ch 236 at 248, [1937] 1 All ER 452 at 460, CA. See also *Blackwell v Blackwell* [1929] AC 318 at 341, HL, per Lord Warrington. Cf *Re Gardom, Le Page v A-G* [1914] 1 Ch 662 at 673 per Eve J. Communication must accord with the terms of the will so that a gift to four persons 'to be dealt with in accordance with my wishes which I have made known to them' does not create a half secret trust unless the wishes were communicated to all four: *Re Spence, Quick v Ackner* [1949] WN 237. In *Re Keen, Evershed v Griffiths* supra the expression 'to them or either of them' was used in the will.

6 *Johnson v Ball* (1851) 5 De G & Sm 85; *Riordan v Banon* (1876) 1R 10 Eq 469; *Re Boyes, Boyes v Carritt* (1884) 26 ChD 531; *Re Hetley, Hetley v Hetley* [1902] 2 Ch 866; *Re Keen, Evershed v Griffiths* [1937] Ch 236, [1937] 1 All ER 452, CA. See also *Blackwell v Blackwell* [1929] AC 318 at 331, 339, HL; *Re Bateman's Will Trusts, Brierley v Perry* [1970] 3 All ER 817, [1970] 1 WLR 1463. The principle of these cases applies a fortiori where it is apparent from the will that the testator had not then decided on the trusts: see *Re Hawksley's Settlements, Black v Tidy* [1934] Ch 384.

7 *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA.

8 See Snell's Equity (31st Edn, 2005) p 559.

9 *Re Baillie, Fitzgerald v Noad* (1886) 2 TLR 660 at 661. However, although there may be no question of the trustee personally benefiting, it could still be said to be fraudulent if, despite his agreement to hold for the secret beneficiaries, the trustee claims to hold on a resulting trust. See also PARA 644 ante.

10 Ie the requirement under the Law of Property Act 1925 s 53(1): see PARA 644 ante; and DEEDS AND OTHER INSTRUMENTS. As to constructive trusts generally see PARAS 625 ante, 687 et seq post.

11 The provisions of *ibid* s 53 do not affect the creation or operation of constructive trusts: see s 53(2). See also DEEDS AND OTHER INSTRUMENTS.

12 *Ottaway v Norman* [1972] Ch 698, [1971] 3 All ER 1325.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iv) Illegality, Fraud and Dispositions Contrary to Public Policy/678. Immoral and illegal trusts.

#### **(iv) Illegality, Fraud and Dispositions Contrary to Public Policy**

##### **678. Immoral and illegal trusts.**

On the principle that equity follows the law, a trust cannot be enforced in equity if it is created for an object or purpose in favour of which a direct gift or a contract cannot be enforced in law on the ground of being immoral or otherwise contrary to public policy or illegal<sup>1</sup>.

<sup>1</sup> *Hamilton v Waring* (1820) 2 Bligh 196 at 209, HL; *Benyon v Nettlefold* (1850) 3 Mac & G 94; *Brown v Burdett* (1882) 21 ChD 667; *Thompson v Thomas* (1891) 27 LR 457; *Morley v Rennoldson* [1895] 1 Ch 449, CA; *Phillips v Probyn* [1899] 1 Ch 811; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL. See also *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, [1961] ALR 339, Aust HC. As to contracts which are void for illegality see CONTRACT vol 9(1) (Reissue) PARA 836 et seq. As to trusts in restraint of alienations see PARA 743 post; and PERSONAL PROPERTY vol 35 (Reissue) PARAS 1268-1269. As to the circumstances in which the disposer cannot take advantage of the illegality of the trust to claim a resulting trust for himself see *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; and PARA 682 post. In highly exceptional cases a trust which was initially valid might become invalid on public policy grounds where the whole express purpose of the trust became contrary to public policy: *Re Abacus (CI) Ltd (Trustee of the Esteem Settlement)*, *Grupo Torras SA v Al Sabah* [2003] JRC 092 at [130], [2004] WTLR 1 at [130], 6 ITELR 368 at [130] per Deputy Bailiff Birt.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iv) Illegality, Fraud and Dispositions Contrary to Public Policy/679. Discretionary trusts.

## 679. Discretionary trusts.

A discretionary trust for a variety of alternative objects or purposes, some legal and some illegal, according as the trustees may select, is valid so far as respects the legal objects or purposes, and the trustees may exercise their discretionary selection in respect of the objects or purposes which are legal, but they cannot validly do so in respect of those which are illegal<sup>1</sup>. The alternative discretion in favour of the legal objects must, however, be clearly conferred<sup>2</sup>.

If, however, the whole fund is given on a valid trust, for example for a charitable purpose subject to a trust, charge or direction which is not legally binding or an invalid trust or a trust which fails superimposed on it, the basic valid trust stands<sup>3</sup>. If part of a fund is given for an invalid purpose and the residue or surplus is given on a valid trust, then the trust of the residue or surplus will be good if it is possible (for example, by directing an inquiry) to ascertain how much was intended for the invalid purpose and thus to ascertain the amount of the residue or surplus<sup>4</sup>. If there is a primary gift for an invalid purpose, coupled with a gift of any surplus<sup>5</sup> on a valid trust, the gift of surplus will fail, as well as the primary gift, if it is impossible to ascertain how much was intended to be applied to the invalid purpose and that purpose might absorb the whole gift<sup>6</sup>.

Apart from the provisions of the Perpetuities and Accumulations Act 1964, a discretionary trust which may possibly last longer than the perpetuity period is void<sup>7</sup>.

1 *Sorresby v Hollins* (1740) 9 Mod Rep 221; *Grimmett v Grimmett* (1754) Amb 210; *Faversham Corpn v Ryder* (1854) 5 De GM & G 350; *London University v Yarrow* (1857) 1 De G & J 72; *Carter v Green* (1857) 3 K & J 591; *Lewis v Allenby* (1870) LR 10 Eq 668; *Re Piercy, Whitwham v Piercy* [1898] 1 Ch 565, CA (overruling *Johnston v Swann* (1818) 3 Madd 457 and *Baker v Sutton* (1836) 1 Keen 224, so far as inconsistent with *Lewis v Allenby* supra). As to the special rates of tax under discretionary trusts of income see INCOME TAXATION vol 23(2) (Reissue) PARA 1566.

2 *Re Clark, Husband v Martin* (1885) 54 LJ Ch 1080.

3 *Fisk v A-G* (1867) LR 4 Eq 521; *Hunter v Bullock* (1872) LR 14 Eq 45; *Dawson v Small* (1874) LR 18 Eq 114; *Re Williams* (1877) 5 ChD 735; *Re Birkett* (1878) 9 ChD 576 at 581 (cases where the superimposed trusts were for the repair of tombs); *Kelly v A-G* [1917] 1 IR 183 (where the superimposed trusts were for the erection of a chapel and parish house); *Re Parnell, Ranks v Holmes* [1944] Ch 107; *Re Coxen, McCallum v Coxen* [1948] Ch 747, [1948] 2 All ER 492; and see *Re Taylor, Martin v Freeman* (1888) 58 LT 538 at 542. See also CHARITIES vol 8 (2010) PARA 86. In *Re Birkett* supra at 578-579, Jessel MR said that, if there had been no authorities to the contrary, he would have held that the gift to charity was effective only as regards the surplus after the amount required for the invalid trust had been ascertained and deducted (cf the text and note 4 infra). See also *Re Porter, Porter v Porter* [1925] Ch 746 at 751, where Eve J refused to extend the principle applied in the cases where the invalid trusts related to the repair of tombs to a case where the invalid trust was for the erection and maintenance of a masonic temple.

4 *Fisk v A-G* (1867) LR 4 Eq 521; *Champney v Davy* (1879) 11 ChD 949 at 954; *Re Vaughan, Vaughan v Thomas* (1886) 33 ChD 187 at 194; cf *Re Rigley's Trusts* (1866) 15 WR 190 (inquiry directed).

5 A distinct general residuary bequest into which property invalidly bequeathed will fall is not a gift of the surplus for this purpose: see eg *Mitford v Reynolds* (1848) 16 Sim 105 at 119.

6 *Chapman v Brown* (1801) 6 Ves 404 at 410-411; *Limbrey v Gurr* (1819) 6 Madd 151; *A-G v Hinxman* (1820) 2 Jac & W 270; *Cramp v Playfoot* (1858) 4 K & J 479; *Fowler v Fowler* (1864) 33 Beav 616; *Re Vaughan, Vaughan v Thomas* (1886) 33 ChD 187; *Re Taylor, Martin v Freeman* (1888) 58 LT 538; *Re Porter, Porter v Porter* [1925] Ch 746 at 752. See also CHARITIES vol 8 (2010) PARA 86.

7 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1031.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iv) Illegality, Fraud and Dispositions Contrary to Public Policy/680. Voidable trusts.

## 680. Voidable trusts.

Where a settlor has become bankrupt, the trustee of the bankrupt's estate may be able to recover the trust property for the benefit of the creditors.

Where a person is adjudged bankrupt and he has at a relevant time<sup>1</sup> entered into a transaction with any person at an undervalue<sup>2</sup>, the trustee of the bankrupt's estate may apply to the court for an order requiring any property transferred or property representing the proceeds of sale of property so transferred as part of the transaction to be vested in the trustee of the bankrupt's estate as part of that estate<sup>3</sup>. Similar provisions apply where an individual has given a preference to any person<sup>4</sup>. Similar orders may be made<sup>5</sup>, whether or not insolvency proceedings have been taken, by specified persons<sup>6</sup> where a transaction at an undervalue<sup>7</sup> has been made with the purpose of putting assets beyond the reach of a person who is making or may make a claim<sup>8</sup>.

A trust, whether voluntary or not, may be set aside at the suit of the creator of the trust if it is made in consequence of fraud<sup>9</sup>, duress<sup>10</sup> or undue influence<sup>11</sup>.

<sup>1</sup> For the meaning of 'relevant time' see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 660.

<sup>2</sup> For the meaning of 'transaction at an undervalue' see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 654.

<sup>3</sup> As to the orders available see the Insolvency Act 1986 s 342 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 661.

<sup>4</sup> See *ibid* ss 340-342 (ss 341, 342 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq.

<sup>5</sup> As to the orders available see *ibid* s 425; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 666.

<sup>6</sup> See *ibid* s 424 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 665.

<sup>7</sup> See *ibid* s 423(1) (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 664.

<sup>8</sup> As to the precise intention see *ibid* s 423(3); *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489, [2002] WTLR 1027; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 664. While the Insolvency Act 1986 s 423 requires prejudice or potential prejudice to the interests of the claimant, that prejudice does not have to be achieved by the purpose by which the transaction was entered into: *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 at [101], [2007] 1 All ER 1106 at [101] per Arden LJ.

<sup>9</sup> See EQUITY vol 16(2) (Reissue) PARA 412 et seq; GIFTS vol 52 (2009) PARA 259; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 838 et seq.

<sup>10</sup> See CONTRACT vol 9(1) (Reissue) PARA 709; EQUITY vol 16(2) (Reissue) PARA 436.

<sup>11</sup> See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. See also GIFTS vol 52 (2009) PARA 259.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iv) Illegality, Fraud and Dispositions Contrary to Public Policy/681. Ineffectiveness of certain trusts for reducing tax liability.

## **681. Ineffectiveness of certain trusts for reducing tax liability.**

Income which arises under a settlement<sup>1</sup> during the life of the settlor<sup>2</sup> is treated for all purposes of the income tax legislation as the income of the settlor alone and not as the income of any other person if it arises from property in which the settlor has an interest<sup>3</sup>. A settlor is treated as having an interest in property if there are any circumstances<sup>4</sup> in which the property or any related property<sup>5</sup> is, or will or may become, payable to or applicable for the benefit of the settlor or his spouse or civil partner<sup>6</sup>.

Income which arises under a settlement which does not fall to be treated as income of the settlor under the above provisions but which during the life of the settlor is paid to or for the benefit of<sup>7</sup> a relevant child<sup>8</sup> of the settlor in any tax year is treated for income tax purposes as the income of the settlor alone for that year<sup>9</sup>.

Certain capital sums<sup>10</sup> paid directly or indirectly in any tax year by the trustees of a settlement to the settlor will be treated as income of a settlor for the tax year<sup>11</sup>, as will certain capital sums paid to the settlor in a tax year by any body corporate connected with the settlement<sup>12</sup> in that year where an associated payment<sup>13</sup> has been, or is, made directly or indirectly to the body by the trustees of the settlement<sup>14</sup>.

1 For these purposes, 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets (other than a charitable loan arrangement): see Income Tax (Trading and Other Income) Act 2005 s 620(1); and INCOME TAXATION. For these purposes, 'charitable loan arrangement' means any arrangement so far as it consists of a loan of money made by an individual to a charity either: (1) for no consideration; or (2) for a consideration which consists only of interest; and 'charity' includes each of the bodies mentioned in the Income and Corporation Taxes Act 1988 s 507 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1175): Income Tax (Trading and Other Income) Act 2005 s 620(5); and INCOME TAXATION.

2 For these purposes, 'settlor' in relation to a settlement means any person by whom the settlement was made: see *ibid* s 624(1); and INCOME TAXATION.

3 See *ibid* s 624(1); and INCOME TAXATION. See also SETTLEMENTS vol 42 (Reissue) PARA 619 et seq. Certain income is excluded by s 626 and s 627: see INCOME TAXATION.

4 This is subject to the exceptions contained in *ibid* s 625(2): see INCOME TAXATION.

5 In relation to any property, 'related property' means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income from it: see *ibid* s 625(5); and INCOME TAXATION.

6 See *ibid* s 625(1) (as amended); and INCOME TAXATION. Certain persons are excluded from the meaning of 'settlor's spouse or civil partner': see s 625(4) (as amended); and INCOME TAXATION.

7 Or would otherwise be treated (apart from *ibid* s 629) as income of an unmarried minor child of the settlor: see s 629(1)(b); and INCOME TAXATION.

8 'Child' includes a stepchild: see *ibid* s 629(7)(a); and INCOME TAXATION. 'Relevant child' means a minor child who is unmarried or not in a civil partnership: see s 629(7)(d) (as added); and INCOME TAXATION. 'Minor' means a person under the age of 18 years: see s 629(7)(b); and INCOME TAXATION.

9 See *ibid* s 629(1), (2) (as amended); and INCOME TAXATION. As to income retained or accumulated by the trustees see s 631 (as amended); and INCOME TAXATION. As to offshore income gain see s 632; and INCOME TAXATION. As to the disregard of sums not exceeding in total £100 see s 629(3); and INCOME TAXATION.

10 For these purposes, 'capital sum' means any sum paid by way of loan or repayment of a loan, and any other sum which is paid otherwise than as income and is not paid for full consideration in money or money's worth: *ibid* s 634(1).

11 See *ibid* s 633; and INCOME TAXATION.

12 For these purposes, a body corporate is treated as connected with a settlement in any tax year if at any time in that year: (1) it is a close company (or only is not a close company because it is non-UK resident) and the participators then include the trustees of the settlement; or (2) it is controlled by a company falling within head (1) *supra*: *ibid* s 637(8); and INCOME TAXATION.

13 For these purposes 'associated payment', in relation to any capital sum paid to the settlor by a body corporate, means:

- 1 (1) any capital sum paid to the body by the trustees of the settlement; and
- 2 (2) any other sum paid, or asset transferred, to the body by the trustees which is not paid or transferred for full consideration in money or money's worth,

being any sum paid, or asset transferred, in the five years ending or beginning with the date on which the capital sum is paid to the settlor: see *ibid* s 643(3); and INCOME TAXATION.

14 See *ibid* s 641(1); and INCOME TAXATION.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(2) EXPRESS TRUSTS/(iv) Illegality, Fraud and Dispositions Contrary to Public Policy/682. Property put into another's name for an illegal purpose.

## **682. Property put into another's name for an illegal purpose.**

It is clearly established at common law that: (1) property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract; (2) a claimant can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; and (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the claimant has acquired legal title under the illegal contract, that is enough<sup>1</sup>.

In equity there are many authorities to support the proposition that equity will not aid a claimant who has transferred property to another, or purchased property in the name of another, for an illegal purpose<sup>2</sup>, although it seems that he could recover if he repented before the illegal purpose was carried out<sup>3</sup>. The House of Lords has held that, as the law has developed, the equitable principle has become elided into the common law rule<sup>4</sup>. The rule is the same whether a claimant founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality; so a claimant can rely on a resulting trust arising from contributions made to the purchase price of an asset, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction. The test is whether of necessity reliance is placed by the claimant on the illegality in proving his claim<sup>5</sup>.

The majority of the more recent equity cases have been ones in which the presumption of advancement applied<sup>6</sup>. In such cases the claimant is faced with the presumption of gift and can only recover if he brings evidence which rebuts the presumption and shows that no gift was intended<sup>7</sup>. He cannot rely on evidence of an illegal purpose unless he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect<sup>8</sup>. Unless and until the illegal purpose begins to be carried into effect it is sometimes said that he has a locus poenitentiae<sup>9</sup>.

1 See *Feret v Hill* (1854) 15 CB 207; *Taylor v Chester* (1869) LR 4 QB 309; *Alexander v Rayson* [1936] 1 KB 169, CA; *Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA; *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL, applied in *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA (where a married man bought a house jointly with his mistress, but it was conveyed into her sole name with the illegal purpose of frustrating any potential claim by his wife under the Matrimonial Causes Act 1973 s 37(2)(b) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 587)); *Webb v Chief Constable of Merseyside Police* [2000] QB 427, [2000] 1 All ER 209, CA. The court will not give its assistance to the enforcement of executory provisions of an unlawful contract: *Tinsley v Milligan* supra; *Birkett v Acorn Business Machines Ltd* [1999] 2 All ER (Comm) 429, CA.

2 *Cottington v Fletcher* (1740) 2 Atk 155; *Birch v Blagrove* (1755) Amb 264; *Holman v Johnson* (1775) 1 Cowp 341; *Muckleston v Brown* (1801) 6 Ves 52; *Curtis v Perry* (1802) 6 Ves 739; *Ex p Yallop* (1808) 15 Ves 60; *Roberts v Roberts* (1818) Dan 143; *Groves v Groves* (1829) 3 Y & J 163; *Childers v Childers* (1857) 3 K & J 310; *Re Great Berlin Steamboat Co* (1884) 26 ChD 616, CA; *Crichton v Crichton* [1896] 1 Ch 870, CA; *Gascoigne v Gascoigne* [1918] 1 KB 223; *McEvoy v Belfast Banking Co Ltd* [1934] NI 67 at 92, CA; *Re Emery's Investments Trusts*, *Emery v Emery* [1959] Ch 410, [1959] 1 All ER 577; *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC; *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA (distinguished in *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA). It seems that *Cantor v Cox* (1975) 239 Estates Gazette 121 has been disapproved: see *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; *Lowson v Coombes* supra. See also the dissenting judgment of Lord Goff of Chieveley in *Tinsley v Milligan* supra at 351 et seq and 68 et seq.



3 *Davies v Otty (No 2)* (1865) 35 Beav 208; *Symes v Hughes* (1870) LR 9 Eq 475; *Taylor v Bowers* (1876) 1 QBD 291, CA; *Barclay v Pearson* [1893] 2 Ch 154; *Hermann v Charlesworth* [1905] 2 KB 123, CA; *Petherpermal Chetty v Muniandy Servai* (1908) 24 TLR 462, PC; *Rowan v Dann* (1991) 64 P & CR 202, CA.

4 *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; applied in *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA.

5 *Silverwood v Silverwood* (1997) 74 P & CR 453, CA, applying *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL. See also *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA.

6 See *Gascoigne v Gascoigne* [1918] 1 KB 223; *McEvoy v Belfast Banking Co Ltd* [1934] NI 67 at 92, CA; *Re Emery's Investments Trusts, Emery v Emery* [1959] Ch 410, [1959] 1 All ER 577; *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC; *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA (distinguished in *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA).

7 See *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; *Tribe v Tribe* [1996] Ch 107, [1995] 4 All ER 236, CA. See also *Collier v Collier* [2002] EWCA Civ 1095, [2003] WTLR 617 (where the claimant had to bring evidence of an illegal purpose to rebut an alleged express agreement and where Mance LJ at [97] and [105] was critical of the importance attached to the presumption of advancement); *Ali v Khan* [2002] EWCA Civ 974 at [29]-[31], 5 ITELR 232 at [29]-[31] per Morritt V-C (purpose was held not to be illegal).

8 *Tribe v Tribe* [1996] Ch 107, [1995] 4 All ER 236, CA. See also *Nelson v Nelson* (1995) 132 ALR 133; *Collier v Collier* [2002] EWCA Civ 1095, [2003] WTLR 617. See also *Painter v Hutchison* [2007] EWHC 758 (Ch), [2007] All ER (D) 45 (Apr).

9 See *Tribe v Tribe* [1996] Ch 107, [1995] 4 All ER 236, CA.

## UPDATE

### 682 Property put into another's name for an illegal purpose

NOTE 4--*Tinsley*, cited, applied: *Barrett v Barrett* [2008] EWHC 1601 (Ch), [2008] 2 P & CR 345, [2008] All ER (D) 233 (May).

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### 683. Sham trusts.

What appears on the face of it to be a trust may be set aside as a sham<sup>1</sup> if the truth of the matter is that the settlor retains full beneficial entitlement and there is no intention that the apparent beneficiaries are to obtain any benefit<sup>2</sup>. There are conflicting views as to whether the intention must be that of both the trustee and the settlor<sup>3</sup> or whether something less than full intention on the part of the trustee will suffice<sup>4</sup>. In the case of a unilateral declaration of trust only the settlor's intention is relevant<sup>5</sup>.

There is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no trusts enforceable against the trustees there are no trusts and an apparent trust document will have no effect as such<sup>6</sup>.

1 'Sham' has been said to mean 'acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create': *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528, CA, per Diplock LJ.

2 See *Midland Bank plc v Wyatt* [1995] 3 FCR 11, [1995] 1 FLR 696; *Abdel Rahman v Chase Bank (CI) Trust Co Ltd* [1991] JLR 103, Jersey Royal Court. An apparent trust which may, perhaps, be set aside as a sham is what is sometimes referred to as a 'Red Cross trust'. This is a trust in a wide discretionary form set up with a single named beneficiary, such as the Red Cross, but with the trustees having wide powers to add the settlor and his family, and where there is evidence that the Red Cross is not intended to benefit. See the Isle of Man litigation in *Steele v Paz Ltd (in liquidation)* (unreported), extracts from which appear in Butterworths Offshore Cases and Materials (1996) vol 1 at p 338 et seq.

3 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528, CA, per Diplock LJ; *Hitch v Stone* [2001] EWCA Civ 63 at [69], [2001] STC 214 at [69] per Arden LJ; *Re the Esteem Settlement, Abacus (CI) Ltd and Gruppo Torras SA v Al-Sabah* [2003] JRC 092 at [54], [2004] WTLR 1 at [54], 6 ITELR 368 at [54] per Deputy Bailiff Birt; *Shalson v Russo* [2003] EWHC 1637 (Ch) at [190], [2005] Ch 281 at [190], [2003] WTLR 1165 at [190] per Rimer J (where it was also held that it would be sufficient if the intention 'later becomes so shared'); *Mackinnon v Regent Trust Co Ltd* [2004] JLR 477; Underhill and Hayton *Law Relating to Trusts and Trustees* (17th Edn, 2007) p 79. However, where a document implements more than one transaction it is not necessary for every party to the document to be a party to the sham: see *Hitch v Stone* supra obiter at [85] per Arden LJ.

4 See *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 at 245, [1995] 1 FLR 696 at 699 per Young QC (sufficient for a party to go along with the 'shammer' not either knowing or caring what he was signing); *Minwalla v Minwalla* [2004] EWHC 2823 (Fam) at [58], [2005] 1 FLR 771 at [58], [2006] 1 WTLR 311 at [58] per Singer J (willingness to go along with the settlor's actions without any attempt to rein him in sufficed). See also *Lewin on Trusts* (17th Edn, 2000) p 80.

5 *Painter v Hutchison* [2007] EWHC 758 (Ch), [2007] All ER (D) 45 (Apr). See also *Lewin on Trusts* (17th Edn, 2000) p 80.

6 See *Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, CA, where Millett LJ refused to accept that these core obligations included the duties of skill and care, prudence and diligence.

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#### **684. Trusts infringing the rules against perpetuities.**

A limitation created by way of a trust before 16 July 1964 is void ab initio in so far as it infringes the rule against remoteness of vesting which requires that, to be valid, an executory devise or other future limitation must be certain to vest, if at all, within a relevant life or lives in being at the date when the limitation operates and 21 years and a possible period of gestation thereafter<sup>1</sup>. In relation to limitations in instruments taking effect on or after 16 July 1964<sup>2</sup>, the Perpetuities and Accumulations Act 1964 provides that such limitations are valid until, after 'waiting and seeing', it becomes clear that an interest can only vest outside the perpetuity period of statutory lives in being plus 21 years or a period of up to 80 years specified in the instrument as the perpetuity period<sup>3</sup>.

A trust is also as a rule void, even though it creates an interest which takes effect immediately, if it is intended to be of perpetual or indefinite duration and would impose restrictions on the alienation of the income of the trust property extending beyond the common law period of relevant lives in being plus 21 years<sup>4</sup>.

There are certain exceptions to these rules<sup>5</sup>. In particular, a charitable trust is not void merely because it is to be of perpetual or indefinite duration, and, although a charitable trust to be valid must in general take effect, if at all, within the periods permitted by the rule against remoteness of vesting, this requirement does not apply to a gift over from one charity to another<sup>6</sup>.

1 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1008 (statement of rule), 1031 et seq (application of rule to equitable interests). See also *The Rules against Perpetuities and Excessive Accumulations* (Law Com no 133) (1998).

2 The Perpetuities and Accumulations Act 1964 does not apply to appointments made on or after 16 July 1964 under a special power of appointment created before that date: see s 15(5); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1007, 1009.

3 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1009 et seq.

4 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1035. The Perpetuities and Accumulations Act 1964 does not affect this rule: see s 15(4); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1035.

5 As to unobjectionable perpetual interests see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1006; and as to interests to which the rule against remoteness of vesting does not apply see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1041 et seq.

6 See CHARITIES vol 8 (2010) PARA 142; PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1055. Gifts over to charities of the endowments of historic buildings and gardens are also exempted from the rules relating to perpetuities: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1067-1069. As to historic buildings see also NATIONAL CULTURAL HERITAGE.

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### **685. Trusts for accumulation.**

In addition to complying with the rule against perpetuities, trusts for accumulation and dispositions directly or indirectly causing accumulation, wholly or partially, of the rents, profits or income of any real or personal property must be confined<sup>1</sup>, with certain statutory and other exceptions, to one or other of certain alternative statutory periods, any one of which, but not more than one, may be chosen<sup>2</sup>. A trust created by a corporation is not subject to the rule against accumulations, as the rule applies only to natural persons<sup>3</sup>.

1 Legislation restricting accumulations is contained in the Law of Property Act 1925 ss 164-166 and the Perpetuities and Accumulations Act 1964 s 13: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1119 et seq. See also *The Rules against Perpetuities and Excessive Accumulations* (Law Com no 133) (1998).

2 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1119 et seq. As to the exception in favour of trusts for the reduction of the National Debt see PARA 686 post.

3 *Re Dodwell & Co Ltd's Trusts, Baker v Timmins* [1979] Ch 301, [1978] 3 All ER 738.

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## **686. Validation of trust funds for reduction of the National Debt.**

Where by any instrument directions are given for any property being held upon trust and the income of it being wholly accumulated, subject only to payment out of it of any costs, charges and expenses of the trustees and any remuneration to which they may be entitled, for any period to be determined under the provisions of the instrument, and for the property and accumulations being transferred at or before the expiration of that period to the National Debt Commissioners to be applied by them in reduction of the National Debt<sup>1</sup>, the directions are valid and effective, notwithstanding any Act or rule of law to the contrary, unless within three months after receiving notice of the taking effect of the instrument the Treasury disclaims the commissioners' interest under the directions<sup>2</sup>.

1 As to the National Debt and the National Debt Commissioners generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1325 et seq.

2 Superannuation and other Trust Funds (Validation) Act 1927 s 9(1). No person is entitled to require the transfer of any part of the property, income or accumulations otherwise than in accordance with the provisions of the instrument: s 9(1). It is the duty of the trustees of any such trust to render to the National Debt Commissioners such accounts and information relating to the trust as they may reasonably require: s 9(2). As to the exemption from capital gains tax, income tax, inheritance tax and stamp duty in favour of trusts for the reduction of the National Debt see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 285; INCOME TAXATION; INHERITANCE TAXATION vol 24 (Reissue) PARA 523; STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1087. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

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### **(3) CONSTRUCTIVE AND RESULTING TRUSTS**

#### **(i) Constructive Trusts**

##### **A. IN GENERAL**

#### **687. Nature of constructive trust.**

A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust<sup>1</sup> but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property<sup>2</sup>. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust<sup>3</sup>. A third party who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will, however, also be a constructive trustee of that property<sup>4</sup>. As a general principle it may be said that property subject to a constructive trust must have come into the hands of the alleged trustee as a result of unconscionable dealing or in breach of a fiduciary obligation<sup>5</sup>.

A person who holds property on a constructive trust is a constructive trustee in respect of it<sup>6</sup>. He cannot claim for himself any increase in value of the property or any profits earned by it<sup>7</sup>. If he becomes bankrupt, the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists<sup>8</sup>.

In certain circumstances a person is said to be a constructive trustee in a different sense in that no specific property is subjected to a constructive trust but the person is treated constructively as if he had been a trustee so that, like an express trustee, he can be made personally liable to account to the beneficiaries for any losses or gains resulting from his wrongful activities. Treating him as a constructive trustee is merely a formula for imposing an equitable personal liability to account<sup>9</sup>. If he becomes bankrupt, the trust beneficiaries affected by his wrongful activities have no priority but are treated as ordinary creditors as there is no specific property subjected to a constructive trust<sup>10</sup>.

1 As to resulting trusts see PARA 705 et seq post; and as to the saving of constructive trusts from the effect of the requirement that a trust of land must be declared in writing see PARA 624 ante. As to constructive and resulting trusts see also EQUITY vol 16(2) (Reissue) PARAS 852-853.

2 *Bannister v Bannister*[1948] 2 All ER 133, CA; *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*[1969] 2 Ch 276, [1969] 2 All ER 367, CA; *Hussey v Palmer*[1972] 3 All ER 744, [1972] 1 WLR 1286, CA; *Lys v Prowsa Developments Ltd*[1982] 2 All ER 953, [1982] 1 WLR 1044; *Lonrho plc v Fayed (No 2)*[1991] 4 All ER 961, [1992] 1 WLR 1. The sentence in the text was cited with apparent approval in *Kakkar v Szelke* [1989] FSR 225 at 235, CA, per Parker CJ. See also *Ungurian v Lesnoff*[1990] Ch 206, [1989] 3 WLR 840; *Akhtar v Arif*[2006] EWHC 2726 (Ch), [2006] 3 FCR 526, [2007] WTLR 35 (no constructive trust where father claimed he transferred property on the understanding that it was to be conveyed back to him at his request).

3 *Espinasse v Lowe* (1764) 7 Bro Parl Cas 345 at 355, HL. See also *British Reinforced Concrete Engineering Co v Lind* (1917) 86 LJ Ch 486; *Re Eyre-Williams, Williams v Williams*[1923] 2 Ch 533; *Green v Weatherill*[1929] 2 Ch 213; cf *Bannister v Bannister*[1948] 2 All ER 133, CA.

4 *Barnes v Addy*(1874) 9 Ch App 244 at 251 per Lord Selborne LC; *Soar v Ashwell*[1893] 2 QB 390 at 400, 405, CA, per Kay LJ; *Belmont Finance Corp v Williams Furniture Ltd (No 2)*[1980] 1 All ER 393, CA; *Clark v Cutland*[2003] EWCA Civ 810, [2003] 4 All ER 733, [2004] 1 WLR 783. It has been suggested, however, that in such circumstances the trust remains an express trust and that the third party who by his conduct has become affected by it is more properly speaking an express trustee de son tort: *Soar v Ashwell* supra at 394 per Lord Esher MR. As to third parties as constructive trustees see PARAS 698-704 post.

5 *French v Mason* [1999] FSR 597, (1998) Times, 13 November.

6 *Soar v Ashwell*[1893] 2 QB 390 at 393, CA. A person may become a constructive trustee of property vested in him on the failure of trustees of an express trust: see PARA 802 post.

7 See PARAS 696-697 post.

8 See the Insolvency Act 1986 s 283(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216.

9 *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)*[1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582; *English v Dedham Vale Properties Ltd*[1978] 1 All ER 382 at 398, [1978] 1 WLR 93 at 110. See also PARAS 698-704 post. As to the remedy of account of profits see EQUITY vol 16(2) (Reissue) PARA 553; and as to the use of the constructive trust to prevent unconscionable conduct see PARA 689 post. See *Paragon Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400 at 408-409, CA, where Millett LJ explained that the term 'constructive trust' is used to describe two entirely different situations. First, it covers cases 'where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the claimant. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the claimant. A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property . . . to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case . . . the constructive trustee really is a trustee . . . . His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust . . . . [The second class of case] arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were'. This was applied in *Coulthard v Disco Mix Club Ltd*[1999] 2 All ER 457, [2000] 1 WLR 707; *J J Harrison (Properties) Ltd v Harrison*[2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Gwembe Valley Development Co Ltd v Koshy (No 3)*[2003] EWCA Civ 1048, [2004] 1 BCLC 131. See also *Dubai Aluminium Co Ltd v Salaam*[2002] UKHL 48 at [132]-[144], [2003] 2 AC 366 at [132]-[144], [2003] 1 All ER 97 at [132]-[144] per Millett LJ. The misuse of voting rights to obtain new shares does not make the new shares trust property; the new shares come into existence only by reason of the transaction impeached: *Halton International Inc v Guernroy Ltd*[2006] EWCA Civ 801, [2006] All ER (D) 302 (Jun).

10 The provisions of the Insolvency Act 1986 s 283(3) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 226) do not apply.

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## **688. Institutional constructive trust and remedial constructive trust.**

There are two distinct types of constructive trust, namely: (1) the institutional constructive trust; and (2) the remedial constructive trust. Only the first of these is presently recognised as valid in English law<sup>1</sup>.

Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such a trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion<sup>2</sup>. The constructive trust is a substantive institution, in principle like any other trust. Express trusts and constructive trusts are two species of the same genus.

In relation to the remedial constructive trust, in some jurisdictions<sup>3</sup> the view is taken that express and constructive trusts are distinct concepts and not two species of a single genus. The remedial constructive trust is regarded as a judicial remedy giving rise to an enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. It depends for its very existence on an order of the court, such order being creative rather than simply confirmatory<sup>4</sup>. As the law presently stands the courts in England cannot vary proprietary rights by means of a remedial constructive trust, except where they have statutory authority to do so<sup>5</sup>. There are, however, obiter dicta which recognise the possibility that at some time the remedial constructive trust may become a part of English law<sup>6</sup>.

1 See *Re Sharpe (a bankrupt)* [1980] 1 All ER 198 at 203, [1980] 1 WLR 219 at 225 per Browne-Wilkinson J; *Halifax Building Society v Thomas* [1996] Ch 217 at 229, [1995] 4 All ER 673 at 682, CA, per Gibson LJ; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715, [1996] 2 All ER 961 at 997, HL, per Lord Browne-Wilkinson; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, [1998] 2 BCLC 185, CA. See, however, *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 411-416, where the constructive trust appears to have been regarded as a remedy, though on the facts no trust was imposed ('the imposition of a constructive trust is part of the equitable armoury of the court': see at 416 per Laddie J).

2 See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715, [1996] 2 All ER 961 at 997, HL, per Lord Browne-Wilkinson.

3 Canada has been the pioneering jurisdiction in this respect: see eg *Pettkus v Becker* (1980) 117 DLR (3d) 257; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1, Can SC; *Peter v Beblow* (1993) 101 DLR (4th) 621.

4 See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715, [1996] 2 All ER 961 at 997, HL, per Lord Browne-Wilkinson. The distinction between the institutional constructive trust and the remedial constructive trust as understood in Canada is explained by Lambert JA in *Atlas Cabinets and Furniture Ltd v National Trust Co Ltd* (1990) 68 DLR (4th) 161.

5 Eg under the Variation of Trusts Act 1958 (see PARA 1062 et seq post); and the Matrimonial Causes Act 1973 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW).

6 See *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14, CA; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, [1994] 2 All ER 606, PC; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, [1998] 2 BCLC 185, CA.





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### **689. Flexibility of constructive trust principles to prevent fraudulent or unconscionable conduct.**

Although there are some clear categories of constructive trusts, for example, those involving the purchase of land with the common intention to share ownership<sup>1</sup> and those involving profits made by fiduciaries<sup>2</sup> and created by the intermeddling of third parties<sup>3</sup>, the categories of constructive trusteeship are not closed<sup>4</sup>.

Equity will not allow a statute to be used as an instrument or engine of fraud<sup>5</sup>. Thus, if a person attempts to assert full beneficial ownership of property by relying unconscionably on the absence of the statutory formalities requisite for another person's interest, he will be treated as holding the property on constructive trust for that other person<sup>6</sup>. Similarly, if a murderer seeks to take advantage of the right of survivorship in relation to property of which he and the victim were joint tenants, he will be treated as holding the property on constructive trust as to one-half for the victim's estate<sup>7</sup>.

In relatively recent times, Lord Denning MR sought to introduce 'a constructive trust of a new model'<sup>8</sup>, that is, 'a trust imposed whenever justice and good conscience require it . . . a liberal process, founded on large principles of equity, to be applied where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it . . . an equitable remedy by which the court can enable an aggrieved party to obtain restitution'<sup>9</sup>. Lord Denning's views have not prevailed, however, and the cases indicate a movement away from a revolutionary new model constructive trust to an evolutionary extension of the traditional constructive trust<sup>10</sup>.

1 See PARA 690 post.

2 See PARAS 695-697 post.

3 See PARAS 698-704 post.

4 *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382 at 398, [1978] 1 WLR 93 at 110 per Slade J. See also *Lonhro plc v Fayed (No 2)* [1991] 4 All ER 961 at 969, [1992] 1 WLR 1 at 9 per Millett J; *Banner Homes Group plc v Luff Development Ltd* [2000] Ch 372 at 397, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ. The equity which arises in cases of proprietary estoppel has been said to be in the nature of a constructive trust: see *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; and see further *Taylor v Dickens* [1998] 3 FCR 445, [1998] 1 FLR 806; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Yaxley v Gotts* [2000] Ch 162 at 176, [2000] 1 All ER 711 at 721, CA, per Walker LJ; *Oxley v Hiscock* [2004] EWCA Civ 546 at [66], [2005] Fam 211 at [66], [2004] 3 All ER 703 at [66] per Chadwick LJ. See further ESTOPPEL vol 16(2) (Reissue) PARAS 1089-1094.

5 See EQUITY vol 16(2) (Reissue) PARAS 563-564.

6 *Bannister v Bannister* [1948] 2 All ER 133, CA; *Hodgson v Marks* [1971] Ch 892 at 908, [1970] 3 All ER 513 at 521 (this point not dealt with on appeal [1971] Ch 892, [1971] 2 All ER 684, CA). See also *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA; *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044. As to secret trusts see PARAS 672-677 ante; and as to mutual wills see PARA 692 post. All contracts for the sale of land must be made in writing but this does not affect the creation or operation of resulting, implied or constructive trusts: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and SALE OF LAND vol 42 (Reissue) PARA 29. There is much common ground between the doctrines of proprietary estoppel and the constructive trust (*Yaxley v Gotts* [2000] Ch 162 at 176, [2000] 1 All ER 711 at [721], CA, per Walker LJ) and there may be circumstances where a proprietary estoppel claim can be relied upon despite the Law of Property

(Miscellaneous Provisions) Act 1989 s 2 (as amended); but see *Kinane v Mackie-Conteh* [2005] EWCA Civ 45 at [46], [2005] 2 P & CR D9 at [46] per Neuberger LJ. See also *Stack v Dowden* [2007] UKHL 17 at [37], [2007] 2 All ER 929 at [37] per Lord Hope of Craighead.

7 *Schobelt v Barber* [1967] 1 OR 349, 60 DLR (2d) 519, Ont HC; *Re Pechar, Re Grbic* [1969] NZLR 574; *Rasmanis v Jurewitsch* [1970] 1 NSW 650, 70 SRNSW 407, NSW CA. As to the effect of murder and manslaughter on the right to benefit under a will see WILLS vol 50 (2005 Reissue) PARAS 341-342.

8 *Eves v Eves* [1975] 3 All ER 768 at 771, [1975] 1 WLR 1338 at 1341, CA, per Lord Denning MR.

9 *Hussey v Palmer* [1972] 3 All ER 744 at 747, [1972] 1 WLR 1286 at 1290, CA, per Lord Denning MR (with which may be contrasted the decision on similar facts in *Spence v Brown* [1988] Fam Law 291, CA). However, other authorities hold the view that it is unsatisfactory to use the vague concept of justice and good conscience to create equitable proprietary interests under constructive trusts which can have far-reaching implications for purchasers and for creditors under property law and under bankruptcy law: see eg *Re Sharpe (a bankrupt), ex p the trustee of the bankrupt v Sharpe* [1980] 1 All ER 198 at 201, 204, [1980] 1 WLR 219 at 223, 226 per Browne-Wilkinson J; cf *Spence v Brown* supra. See also Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 512 et seq. In New Zealand, the broad rule of Lord Denning MR for the imposition of a constructive trust has been criticised as 'a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result': see *Carly v Farrelly* [1975] 1 NZLR 356 at 367, Auckland SC, per Mahon J. See also *Allen v Snyder* [1977] 2 NSWLR 685, NSW CA; *Re McKeown* [1974] NI 226.

10 See *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Midland Bank plc v Dobson and Dobson* [1986] 1 FLR 171, CA; *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA; *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL; *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, CA. See also *Re Schuppan (a bankrupt) (No 2)* [1997] 1 BCLC 256, where it was held that the principle in *Lloyds Bank plc v Rosset* supra (namely, that an agreement made prior to the acquisition of property that it should be shared beneficially gave rise to a constructive trust where the person asserting a claim to a beneficial interest against the party entitled to the legal estate had altered his position to his detriment in reliance on that agreement) was applicable where the property was acquired through or held by a company owned by the legal owner instead of being owned by the legal owner directly. See further *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391 at 479, [1989] 3 All ER 14 at 57, CA, where Slade LJ, giving the judgment of the court, left open the possibility of the court's imposing a trust de novo on assets not subject to any pre-existing trust as a means of granting equitable relief in a case where it considers it just that restitution should be made. He called this a 'remedial constructive trust'. There is much common ground between the doctrines of proprietary estoppel and the constructive trust (*Yaxley v Gotts* [2000] Ch 162 at 176, [2000] 1 All ER 711 at [721], CA, per Walker LJ) and there may be circumstances where a proprietary estoppel claim can be relied upon despite the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); but see *Kinane v Mackie-Conteh* [2005] EWCA Civ 45 at [46], [2005] 2 P & CR D9 at [46] per Neuberger LJ. See also *Stack v Dowden* [2007] UKHL 17 at [37], [2007] 2 All ER 929 at [37] per Lord Hope of Craighead.

## UPDATE

### 689 Flexibility of constructive trust principles to prevent fraudulent or unconscionable conduct

NOTE 6--See also *S v S* [2006] EWHC 2892 (Fam), [2007] 1 FLR 1123 (proprietary estoppel which did not give rise to constructive trust could not be relied on to avoid requirement for dispositions of interests in land to be made in writing).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/(i) Constructive Trusts/A. IN GENERAL/690. Common intention to share ownership of land.

## 690. Common intention to share ownership of land.

A constructive trust will arise in connection with the legal title to property wherever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest<sup>1</sup>. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate<sup>2</sup>.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive<sup>3</sup>.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust<sup>4</sup>.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition<sup>5</sup>.

Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement<sup>6</sup>.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive<sup>7</sup>. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property<sup>8</sup>.

If a conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property, there is no room for the application of the doctrine of resulting, implied or constructive trusts<sup>9</sup>.

Many cases in this area involve the purchase of property for joint occupation. It used to be accepted that there were no distinct and separate principles applying to such cases<sup>10</sup>. However, this may no longer be the case<sup>11</sup>.

1 *Gissing v Gissing* [1971] AC 886 at 905, [1970] 2 All ER 780 at 790, HL, per Lord Diplock; *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132, [1990] 1 All ER 1111 at 1118, HL, per Lord Bridge of Harwich. See also *Eves v Eves* [1975] 3 All ER 768 at 771, [1975] 1 WLR 1338 at 1341, CA, per Lord Denning MR; *Grant v Edwards* [1986] Ch 638 at 646-647, [1986] 2 All ER 426 at 431, CA, per Nourse LJ, and at 651 and 434 per Mustill LJ.

2 *Gissing v Gissing* [1971] AC 886 at 906, [1970] 2 All ER 780 at 790, HL, per Lord Diplock.

3 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132, [1990] 1 All ER 1111 at 1118, HL, per Lord Diplock (the finding of an agreement can only be based on evidence of express discussions between the parties however imperfectly remembered). See also *Eves v Eves* [1975] 3 All ER 768 at 774, [1975] 1 WLR 1338 at 1343-1344, CA, per Brightman J; *Grant v Edwards* [1986] Ch 638 at 647, [1986] 2 All ER 426 at 431, CA, per Nourse LJ, and at 654 and 438 per Sir Browne-Wilkinson V-C; *Hyett v Stanley* [2003] EWCA Civ 942 at [8] et seq, [2003] 3 FCR 253 at [8] et seq per Sir Martin Nourse.

4 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132-133, [1990] 1 All ER 1111 at 1118-1119, HL, per Lord Bridge of Harwich; *Grant v Edwards* [1986] Ch 638 at 654, [1986] 2 All ER 426 at 436, CA, per Sir Browne-Wilkinson V-C; *Oxley v Hiscock* [2004] EWCA Civ 546 at [54], [2005] Fam 211 at [54], [2004] 3 All ER 703 at [54] per Chadwick LJ. In the absence of a proved or inferred bargain or intention, it is doubtful whether the making of subsequent indirect contributions, for instance in the shape of a contribution to general household expenses, is sufficient to found an interest: *Lloyds Bank plc v Rosset* supra at 132 and 1118 per Lord Bridge of Harwich; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 P & CR 244, [2005] 2 FCR 739 (applied in *Murphy v Gooch* [2007] EWCA Civ 603, [2007] All ER (D) 350 (Jun)). See also *Legder-Beadell v Peach* [2006] All ER (D) 245 (Nov) (Ch).

5 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132, [1990] 1 All ER 1111 at 1118, HL, per Lord Bridge of Harwich; *Gissing v Gissing* [1971] AC 886 at 901, [1970] 2 All ER 780 at 786, HL, per Dilhorne V-C; *Grant v Edwards* [1986] Ch 638 at 651-652, [1986] 2 All ER 426 at 434, CA, per Mustill LJ; *Stokes v Anderson* [1991] FCR 539; *Mortgage Corp Ltd v Shaire, Mortgage Corp Ltd v Lewis Silkin (a firm)* [2001] Ch 743 at 750, [2001] 4 All ER 364 at 370-371 per Neuberger J; *Hyett v Stanley* [2003] EWCA Civ 942, [2003] 3 FCR 253. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that 'equity looks on that as done which ought to be done'; or an equity may arise under the principles developed in the proprietary estoppel cases: *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 397-398, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ. See also *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 (Ch), [2005] 2 P & CR 105 (affd [2005] EWCA Civ 1355, [2006] 1 P & CR D55); *Cobbe v Yeomans Row Management Ltd* [2005] EWHC 266 (Ch), [2005] 2 P & CR D2 (affd [2006] EWCA Civ 1139, [2006] 1 WLR 2964, [2006] WTLR 1473); *Van Laethem v Brooker* [2005] EWHC 1478 (Ch), [2005] 1 FCR 697, [2006] 2 FLR 495.

6 The detriment need not necessarily consist of the expenditure of money or some other quantifiable financial detriment: *Grant v Edwards* [1986] Ch 638 at 647, [1986] 2 All ER 426 at 431, CA, per Nourse LJ; *Eves v Eves* [1975] 3 All ER 768 at 772, [1975] 1 WLR 1338 at 1342, CA, per Lord Denning MR.

7 *Grant v Edwards* [1986] Ch 638 at 652, [1986] 2 All ER 426 at 437, CA, per Nourse LJ.

8 *Oxley v Hiscock* [2004] EWCA Civ 546 at [69], [2005] Fam 211 at [69], [2004] 3 All ER 703 at [69] per Chadwick LJ (drawing on a passage from *Grant v Edwards* [1986] Ch 638 at 656, [1986] 2 All ER 426 at 439, CA, per Browne-Wilkinson V-C); cited with approval in *Stack v Dowden* [2007] UKHL 17 at [61], [2007] 2 All ER 929 at [61] per Baroness Hale, with the addition of the words 'taking account of all conduct which throws light on the question what shares were intended'. It has been suggested that it may be more satisfactory to accept that there is no difference in cases of this nature between constructive trusts and proprietary estoppel: *Drake v Whipp* [1996] 2 FCR 296 at 301-302, CA, per Peter Gibson LJ. See also *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 3 FCR 693, [2004] 2 FLR 1010; *Van Laethem v Brooker* [2005] EWHC 1478 (Ch), [2005] 1 FCR 697, [2006] 2 FLR 495. However, in *Stack v Dowden* supra at [37] Lord Walker was 'less enthusiastic' about the assimilation of proprietary estoppel and common interest constructive trusts. For application of constructive and resulting trust principles in relation to the purchase of property by cohabitants see PARA 722 post.

9 Unless and until the conveyance is set aside or rectified, the declaration in the document speaks for itself: *Goodman v Gallant* [1986] Fam 106 at 110-111, [1986] 1 All ER 311 at 314, CA, per Slade LJ; cited with approval in *Stack v Dowden* [2007] UKHL 17 at [49], [2007] 2 All ER 929 at [49] per Baroness Hale. A declaration in a conveyance that the survivor is entitled to give a valid receipt for capital money is not in itself to be regarded as an express declaration of trust: *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA; *Huntingford v Hobbs* [1993] 1 FCR 45, [1993] 1 FLR 736, CA (Dillon LJ dissenting); and see *Stack v Dowden* supra per Baroness Hale at [51] and Lord Neuberger at [130].

10 See *Gissing v Gissing* [1971] AC 886 at 901, [1970] 2 All ER 780 at 786, HL, per Dilhorne V-C; *Cobbe v Yeomans Row Management Ltd* [2005] EWHC 266 (Ch), [2005] 2 P & CR D2 (affd [2006] EWCA Civ 1139, [2006] WTLR 1473).

11 See *Stack v Dowden* [2007] UKHL 17 at [31], [2007] 2 All ER 929 at [31] per Lord Walker and at [58] per Baroness Hale; but see arguments of Lord Neuberger to the contrary at [103]. See also PARA 722 post.

## UPDATE

### 690 Common intention to share ownership of land

NOTE 4--*Murphy*, cited, reported at [2007] 3 FCR 96. *Oxley*, cited, applied in *Griffiths v Cork* [2007] EWHC 1827 (Ch), (2007) 10 ITELR 313.

NOTE 6--Nor is it necessary that the detriment consist of the performance of any act agreed by the parties; any detriment will suffice: *Williams v Parris* [2008] EWCA Civ 1147, [2009] 1 P & CR 169, [2008] All ER (D) 235 (Oct).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/(i) Constructive Trusts/A. IN GENERAL/691. Contractual and other relationships creating constructive trusts.

## **691. Contractual and other relationships creating constructive trusts.**

The facts and dealings between persons may be such that in equity a fiduciary character is imposed on one of them towards the other in relation to property held by the former, who then may be said to hold it on a constructive trust, the extent and obligations of the trust depending on the relationship between the parties<sup>1</sup>. Thus, for example, a vendor who is bound by a specifically enforceable contract for the immediate sale of land is in a qualified sense a trustee of the land for the purchaser<sup>2</sup>. Similarly, an oral contract for sale and purchase creates a constructive trust of a reversionary interest in shares forming a fund subject to a settlement, the reversionary interest being the subject of the contract<sup>3</sup>.

In consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control and, if they misapply the funds, they commit a breach of trust<sup>4</sup>.

An executor de son tort may be, but is not necessarily, a constructive trustee<sup>5</sup>.

1 See *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025 (where by mistake of fact the claimant paid the defendant twice but could trace the second payment held by the defendant as constructive trustee). The reasoning in this case that a person who pays money to another under a mistake of fact retains an equitable property in it and that the conscience of that other is subjected to a fiduciary duty to respect his proprietary right is, in the light of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, 'at best doubtful' (*Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 904 per Knox J), though the actual result may be supported on the ground of constructive trust. See also *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, [1978] 1 WLR 93; *Lysus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044.

2 See PARA 620 ante. See also *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073. As to other relationships in which prima facie the relation is not one of trustee and beneficiary see PARA 611 et seq ante. Where there was a joint grant of a patent and an agreement that one joint owner should exploit it, the person who so exploited it was not held to be a trustee of all the benefits that he received by so doing, and whether he was a trustee or not depended on the terms of the agreement: *Young v Wilson* (1955) 72 RPC 351.

3 *Oughtred v IRC* [1960] AC 206 at 239-240, [1959] 3 All ER 623 at 633, HL, per Lord Jenkins; *Bishop Square Ltd v IRC* (1999) 78 P & CR 169, CA.

4 *Belmont Finance Corp'n v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405, CA, per Buckley LJ, cited as stating the law in *Rolled Steel Products (Holdings) Ltd v British Steel Corp'n* [1986] Ch 246 at 297-298, [1985] 3 All ER 52 at 87, CA, per Slade LJ. See also *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 290, [1992] 4 All ER 385 at 402-403 per Millett J; affd [1991] Ch 547, [1992] 4 All ER 451, CA (principle was extended to misapplications by any person whose fiduciary position within the company gave him control of funds or enabled him to misapply them).

5 *James v Williams* [2000] Ch 1, [1999] 3 All ER 309, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/(i) Constructive Trusts/A. IN GENERAL/692. Mutual wills.

## 692. Mutual wills.

Where persons, such as husband and wife, or brother and sister, make an arrangement as to the disposal of their property after their deaths and make mutual wills pursuant to that arrangement which are intended to be unalterable, then, if one person dies and the survivor subsequently revokes<sup>1</sup> or alters his testamentary dispositions in breach of the arrangement, the survivor's personal representatives will be granted probate or letters of administration in the ordinary way<sup>2</sup>. They will, however, hold his relevant property on constructive trust for the persons intended to benefit under the mutual arrangement<sup>3</sup>.

The arrangement must be more than an agreement to make wills in identical terms<sup>4</sup>; it must reveal a contract not to revoke the will after the death of the first to die or a contract not to depart from the arrangement after the death of the first to die (which would allow revocation of a will so long as the new will still gave effect to the arrangement<sup>5</sup>). The contract must be legally enforceable<sup>6</sup>.

The constructive trust arises on the death of the first to die so that disclaimer by the survivor of any benefits under the deceased's will does not frustrate the interests of a beneficiary under the arrangement<sup>7</sup>, and so that a beneficiary's interest vests on the first death and does not lapse if subsequently the beneficiary predeceases the survivor<sup>8</sup>. A constructive trust arises whether or not the survivor takes any benefit under the will of the first to die<sup>9</sup>.

Unless the mutual will is clearly drafted, problems may arise over the extent of the property which is subject to the mutual arrangement. It is a question of construing the will to ascertain the extent to which the survivor's property and the property passing from the deceased to the survivor may be bound by the mutual arrangement<sup>10</sup>. It appears that there is a floating trust, where the survivor is intended during his life to deal as absolute owner with the deceased's property and on his death to bequeath the residue in the agreed fashion<sup>11</sup>.

The parties may release each other from their bargain by mutual agreement; and it seems that during their joint lifetimes either may revoke his will separately, provided that he gives notice of revocation to the other party<sup>12</sup>. Indeed, notice during the lifetime of the first to die may be unnecessary where the survivor receives notice after the death and he has an opportunity to alter his will<sup>13</sup>. Moreover, the survivor will not be bound by the agreement even where the will of the first to die has not been revoked but merely varied by a codicil, at least where the alteration is 'not insignificant'<sup>14</sup>.

Similar principles apply in the case of a joint will<sup>15</sup>.

1 This includes revocation by a subsequent marriage: *Re Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA.

2 *Re Heys, Walker v Gaskill* [1914] P 192.

3 *Re Oldham, Hadwen v Myles* [1925] Ch 75; *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, PC; *Birmingham v Renfrew* (1936) 57 CLR 666, Aust HC; *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939. See also WILLS vol 50 (2005 Reissue) PARA 308.

4 *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939; *Birch v Curtis* [2002] EWHC 1158 (Ch), [2002] 2 FLR 847, [2002] Fam Law 815.



5 *Re Oldham, Hadwen v Myles* [1925] Ch 75 (where the wife had revoked her mutual will after her husband's death, but had made another in similar terms).

6 *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63 at 71, [1997] 3 FCR 601 at 609, CA, per Leggatt LJ, and at 75 and 615 per Morritt LJ. A constructive trust will not be imposed on property of the survivor in the absence of an agreement: see *Healey v Brown* [2002] EWHC 1405 (Ch), [2002] WTLR 849, 4 ITELR 894 (an agreement relating to land was unenforceable because it did not comply with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see SALE OF LAND vol 42 (Reissue) PARA 29) and, hence, wills made in reliance on the agreement were not mutual).

7 *Dufour v Pereira* (1769) 1 Dick 419 at 421; *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190.

8 *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190.

9 *Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129.

10 *Re Green, Lindner v Green* [1951] Ch 148, [1950] 2 All ER 913.

11 See *Birmingham v Renfrew* (1936) 57 CLR 666 at 689, Aust HC, per Dixon J ('It is only by the special doctrines of equity that such a floating obligation suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt, gifts and settlements inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition inter vivos is therefore not unqualified'); cited with approval in *Re Cleaver, Cleaver v Insley* [1981] 2 All ER 1018, [1981] 1 WLR 939. See also *Ottaway v Norman* [1972] Ch 698, [1971] 3 All ER 1325; *Healey v Brown* [2002] EWHC 1405 (Ch), [2002] WTLR 849, 4 ITELR 894.

12 *Dufour v Pereira* (1769) 1 Dick 419.

13 *Stone v Hoskins* [1905] P 194; doubted in *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11. In Australia, the principles giving rise to a trust have been held to be applicable in a case where a party, not being the first to die, had lost the capacity to revoke his will and make a new will: see *Low v Perpetual Trustees WA Ltd* (1995) 14 WAR 35 (where the wife suffered from senile dementia, and the personal representatives of the husband, who was the first to die and who had made a fresh will, were held to hold his estate upon trust to perform the terms of the mutual wills).

14 *Re Hobley, National Westminster Bank plc v Twentyman* (1997) Times, 16 June.

15 *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190; *Re Piazz-Smyth* [1898] P 7; *Re Duddell, Roundway v Roundway* [1932] 1 Ch 585.

## UPDATE

### 692 Mutual wills

NOTE 3--See *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch), [2007] 4 All ER 81.

NOTE 4--See *Davies v Revenue and Customs Comrs* [2009] UKFTT 138 (TC), [2009] WTLR 1151 (no evidence of binding agreement).

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### **693. Proprietary estoppel.**

The doctrine of proprietary estoppel is considered elsewhere in this work<sup>1</sup>, but it has been observed that at a high level of generality there is much common ground between that doctrine and the constructive trust<sup>2</sup>. The 'common intention constructive trust' has been said to be closely akin to, if not indistinguishable from, proprietary estoppel<sup>3</sup>. The principle of the doctrine in its broadest form is that where one person (A) has acted to his detriment on the faith of a belief which was known to and encouraged by another person (B) that he either has or is going to be given a right over B's property, B cannot insist on his legal rights if to do so would be inconsistent with A's belief<sup>4</sup>. If a proprietary estoppel claim is established, the court has to decide what form the relief should take<sup>5</sup>.

1 See ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

2 *Yaxley v Gotts* [2000] Ch 162 at 176, [2000] 1 All ER 711 at 721, CA, per Walker LJ. See also *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA.

3 *Yaxley v Gotts* [2000] Ch 162 at 180, [2000] 1 All ER 711 at 724, CA, per Walker LJ. But see Lord Walker's arguments against assimilation of proprietary estoppel and common interest constructive trusts in *Stack v Dowden* [2007] UKHL 17 at [37], [2007] 2 All ER 929 at [37]; and see PARA 690 ante.

4 See *Re Basham* [1987] 1 All ER 405 at 410, [1986] 1 WLR 1498 at 1503 per Mr Nugee QC; *Wayling v Jones* (1993) 69 P & CR 170 at 172, CA, per Balcombe LJ; *Gillett v Holt* [2000] 2 All ER 289 at 302, [2000] 3 WLR 815 at 830, CA, per Walker LJ.

5 The aim is to achieve 'the minimum equity to do justice to the [claimant]': *Crabb v Arun DC* [1976] Ch 179 at 198, [1975] 3 All ER 865 at 880, CA, per Scarman LJ. The wide range of possible relief appears from Snell's Equity (31st Edn, 2005) pp 283-288. See also *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501.

### **UPDATE**

#### **693 Proprietary estoppel**

NOTES 2, 3--See also *S v S* [2006] EWHC 2892 (Fam), [2007] 1 FLR 1123.

NOTE 3--See *Q v Q* [2008] EWHC 1874 (Fam), [2009] WTLR 1591.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/(i) Constructive Trusts/A. IN GENERAL/694. The *Pallant v Morgan* equity.

### **694. The *Pallant v Morgan* equity.**

The *Pallant v Morgan*<sup>1</sup> equity, as it has been called<sup>2</sup>, is closely related to proprietary estoppel<sup>3</sup> and constructive trust.

A *Pallant v Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one of the parties to the arrangement: it is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it<sup>4</sup>. It is unnecessary that the arrangement or understanding should be contractually enforceable<sup>5</sup>. Indeed, if it is, there is unlikely to be any need to invoke the *Pallant v Morgan* equity, since equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust<sup>6</sup>. It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party (the 'acquiring party') will take steps to acquire the relevant property, and that, if he does so, the other party (the 'non-acquiring party') will obtain some interest in that property<sup>7</sup>. Further it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, more accurately, before it is too late for the parties to be restored to a position of no advantage or detriment) that he no longer intends to honour the arrangement or understanding<sup>8</sup>. It is necessary that, in reliance on the arrangement or understanding the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property or which is detrimental to the ability of the non-acquiring party to acquire the property on equal terms<sup>9</sup>. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it<sup>10</sup>. Although in many cases the advantage or detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature<sup>11</sup>. Further, although there will usually be advantage to the one and co-relative disadvantage to the other, the existence of both advantage and detriment is not essential: either will do<sup>12</sup>. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted<sup>13</sup>.

A *Pallant v Morgan* equity may also arise in relation to property already owned by one of the parties who will become a trustee on the basis that 'equity looks on that as done which ought to be done'<sup>14</sup>. It will not arise where an agreement has been made subject to contract with the intent that specific matters remain in a state of negotiation until a future agreement is made<sup>15</sup>.

1 *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951. In that case there was an agreement between the claimant's and the defendant's respective agents that they would not compete against each other for a lot at auction, but that the defendant's agent alone should bid. The proper inference from the facts was that the defendant's agent, when he bid for the lot, was bidding at auction for both parties on an agreement that there should be an arrangement between the parties on the division of the lot if he were successful, as he was. There was too much uncertainty as to the terms of the arrangement for a decree of specific performance to be ordered, but the claimant was none the less entitled to a remedy. If the parties could not agree on a division, the property would have to be re-sold and the proceeds divided equally between them. In these circumstances, proprietary estoppel was inappropriate: the claimant had not suffered any detriment as a consequence of the

agent's agreement not to bid, for he would have been outbid by the defendant's agent. However, the defendant had obtained an advantage by keeping the claimant out of the bidding, as he obtained the lot for less than he would have had to pay if the claimant had been bidding against him.

2 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 397, [2000] 2 All ER 117 at 137, CA, per Chadwick LJ.

3 As to proprietary estoppel see PARA 693 ante; and ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

4 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 397, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ.

5 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ.

6 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ. As to specific performance see SPECIFIC PERFORMANCE.

7 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ; applied in *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 3 FCR 693, [2004] 2 FLR 1010.

8 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ.

9 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 138-139, CA, per Chadwick LJ.

10 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 398, [2000] 2 All ER 117 at 139, CA, per Chadwick LJ.

11 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 399, [2000] 2 All ER 117 at 139, CA, per Chadwick LJ.

12 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 399, [2000] 2 All ER 117 at 139, CA, per Chadwick LJ.

13 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 399, [2000] 2 All ER 117 at 139, CA, per Chadwick LJ.

14 See *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 at 397, [2000] 2 All ER 117 at 138, CA, per Chadwick LJ ('the arrangement should be of sufficient certainty to be enforced specifically'). See also *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355 at [48], [2002] All ER (D) 360 (Mar) at [48] per Mummery LJ. However, a 'post-acquisition' constructive trust is not limited to a situation in which there is a specifically enforceable contract: see *Cobbe v Yeomans Row Management Ltd* [2005] EWHC 266 (Ch) at [48], [2005] 2 P & CR D2 at [48] per Eatherington J (affd [2006] EWCA Civ 1139, [2006] WTLR 1473).

15 *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355 at [48], [2002] All ER (D) 360 (Mar) at [48] per Mummery LJ. See also *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 at 127-128, [1987] 2 All ER 387 at 394-395, PC. However, there may be circumstances where one party has created a belief that he will not withdraw from the transaction: see *Holiday Inns Inc v Broadhead* (1974) 232 Estates Gazette 951, Ch; *Cobbe v Yeomans Row Management Ltd* [2005] EWHC 266, [2005] 2 P & CR D2 (affd [2006] EWCA Civ 1139, [2006] WTLR 1473).

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## **B. THE FIDUCIARY AS CONSTRUCTIVE TRUSTEE**

### **695. Renewable leaseholds.**

Where a person holding a lease as a trustee<sup>1</sup> or otherwise clothed with a fiduciary character towards other persons in relation to a lease<sup>2</sup> obtains a renewal of the lease, he normally<sup>3</sup> holds the renewed lease in trust for those persons to the extent of their respective interests<sup>4</sup>. The fact that the landlord expressly refused to renew for the benefit of the beneficiaries makes no difference<sup>5</sup> and it is immaterial that the new lease contains additional property and is at an increased rent<sup>6</sup>. Where the person clothed with a fiduciary character purchases the reversion, he holds the reversion on trust if the lease is renewable by custom or contract<sup>7</sup>. It has been held, however, that in the absence of fraud he does not hold the reversion on trust if the lease is not so renewable<sup>8</sup>. Nevertheless, without considering such cases, the Court of Appeal has held that, if a trustee who owns the leasehold gets in the freehold, the freehold belongs to the trust<sup>9</sup>.

1 As to renewable leases comprised in settlements see SETTLEMENTS vol 42 (Reissue) PARAS 975-980.

2 *Re Biss, Biss v Biss*[1903] 2 Ch 40, CA, a lease of a shop of an intestate was held by his widow as administratrix; the landlord refused to renew the lease in her favour but one of her sons (helping her to run the shop) obtained a renewal for himself, and this was held unimpeachable as the son was not a fiduciary. A trustee is normally under a duty to obtain a renewal if he can do so on beneficial terms (*Re Biss, Biss v Biss* supra at 43 per Buckley J) but not in all circumstances (see *Harris v Black* (1983) 46 P & CR 366, CA). In *Savage v Dunningham*[1974] Ch 181, [1973] 3 All ER 429, a tenant of a flat who shared it with others, paying a contribution to the rent, was held not to be a fiduciary so that he retained the benefit of a 62-year lease granted to him.

3 If, on the true construction of a trust instrument, there is found an express or implied direction that the trustee may retain the renewed lease for his own benefit, there is no room for the application of the rule: *Re Knowles' Will Trusts, Nelson v Knowles*[1948] 1 All ER 866 at 870-871, CA.

4 *Plowman v Plowman* (1693) 2 Vern 289; *Keech v Sandford* (1726) Cas temp King 61; *Rakestraw v Brewer* (1728) 2 P Wms 511; *Blewett v Millett* (1774) 7 Bro Parl Cas 367; *Griffin v Griffin* (1804) 1 Sch & Lef 352; *James v Dean* (1808) 15 Ves 236; *Fitzgibbon v Scanlan* (1813) 1 Dow 261 at 269, HL, per Lord Eldon LC; *Hardman v Johnson* (1815) 3 Mer 347; *M'Nulty v Hamill* (1815) Beat 544; *Randall v Russell* (1817) 3 Mer 190; *Maunsell v O'Brien* (1835) 1 Jo Ex Ir 176; *Mill v Hill* (1852) 3 HL Cas 828; *Clegg v Edmondson* (1857) 8 De GM & G 787; *Archbold v Scully* (1861) 9 HL Cas 360; *Re Anderson's Estate* (1869) 18 WR 248; *Isaac v Wall*(1877) 6 ChD 706; *Re Morgan, Pillgrem v Pillgrem*(1881) 18 ChD 93, CA; *Re Lulham, Brinton v Lulham* (1885) 53 LT 9, CA; *Bevan v Webb*[1905] 1 Ch 620 at 625; *Re Knowles' Will Trusts, Nelson v Knowles*[1948] 1 All ER 866, CA. See also EQUITY vol 16(2) (Reissue) PARA 852. If the creator of the trust himself takes a renewed lease, he holds it for the trust: *Re Lulham, Brinton v Lulham* supra. Where leaseholds were settled and the husband of the tenant for life used his position as such to obtain a new lease, he was held to be in a fiduciary position and to hold the new lease on the trusts of the settlement: *Re Local Registration of Title (Ireland) Act 1891 and Smith* (1918) 52 ILT 113. As to the renewal of a lease of partnership premises see PARTNERSHIP vol 79 (2008) PARA 109; as to renewal by a tenant for life see SETTLEMENTS vol 42 (Reissue) PARA 975; and as to renewal by a mortgagee see MORTGAGE vol 77 (2010) PARA 196.

5 *Keech v Sandford* (1726) Cas temp King 61; *Fitzgibbon v Scanlan* (1813) 1 Dow 261 at 269, HL, per Lord Eldon LC.

6 *Re Morgan, Pillgrem v Pillgrem*(1881) 18 ChD 93; but see *Acheson v Fair* (1843) 2 Con & Law 208.

7 *Re Lord Ranelagh's Will*(1884) 26 ChD 590; *Phillips v Phillips*(1885) 29 ChD 673, CA. Such a purchaser may have a charge on the trust estate for the purchase money paid: *Isaac v Wall*(1877) 6 ChD 706. See also SETTLEMENTS vol 42 (Reissue) PARA 980.

8 *Randall v Russell* (1817) 3 Mer 190 (where an original right of renewal of the lease by custom had been terminated by a statutory conveyance of the reversion before its purchase); *Longton v Wilsby* (1897) 76 LT 770; *Bevan v Webb*[1905] 1 Ch 620.

9 *Protheroe v Protheroe*[1968] 1 All ER 1111, [1968] 1 WLR 519, CA; followed in *Thompson's Trustee in Bankruptcy v Heaton*[1974] 1 All ER 1239, [1974] 1 WLR 605.

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### **696. Accretions to trust property.**

Where an accretion of any kind comes to property held in trust or in a fiduciary capacity, the accretion cannot be retained by the holder of the property but forms part of the capital of the trust property for the benefit of the person or object beneficially interested in it<sup>1</sup>.

<sup>1</sup> *Re Curteis' Trusts* (1872) LR 14 Eq 217; *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544, HL; *Re Payne's Settlement, Kibble v Payne* (1886) 54 LT 840; *Lloyd-Jones v Clark-Lloyd* [1919] 1 Ch 424, CA. See also *Yem v Edwards* (1857) 1 De G & J 598. Where, however, a person is a trustee of property only in respect of a specific sum charged on it or payable out of it, and is absolute owner of the rest, he is beneficially entitled to the whole of any accretion to it: *Re Campbell, Campbell v Campbell* [1893] 3 Ch 468.

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### **697. Profits from trust property or fiduciary relationship.**

The principle that a trustee must not profit from his trust<sup>1</sup> is sometimes a branch of the rule that a trustee must not put himself in a position in which his own interests and those of his beneficiaries may possibly conflict<sup>2</sup> and sometimes merely an application of the principle that that which is the fruit of trust property or of the trusteeship is itself trust property<sup>3</sup>. A trustee or other fiduciary is liable to account for profits arising directly or indirectly from the trust property itself or for profits acquired by reason of the fiduciary relationship<sup>4</sup>.

These principles do not apply where a trustee has been positively enabled to make a profit out of his position by the testator or settlor under whose disposition the trust arose, for instance where he has been given an express power to distribute a fund among a class including himself<sup>5</sup>. Moreover, in exceptional circumstances the court has jurisdiction to relax these principles<sup>6</sup>.

It has been held that a trustee's liability is merely a personal liability to account where by reason of the fiduciary relationship he obtained a personal advantage for himself by way of a bribe or a commission<sup>7</sup>; but the main authority<sup>8</sup> for that proposition has now been doubted by the Privy Council<sup>9</sup> which has said that that authority is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that he should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. It follows that the bribe and the property from time to time representing it (and other property received in breach of his fiduciary duties) are held on constructive trust so that the beneficiaries will have a proprietary tracing claim<sup>10</sup>.

Unless otherwise authorised by the trust instrument<sup>11</sup>, the trustee or other fiduciary is under a stringent duty to account for any profits. It is immaterial that he acted honestly and in his beneficiaries' best interests, that they would not otherwise have obtained the profits and that the profits were obtained through use of his assets and skills<sup>12</sup>. Remuneration may, however, be awarded to a particular trustee in respect of skills of special value<sup>13</sup>. A partner may make a profit from information obtained in the course of the partnership business where he does so in another firm which is outside the scope of the partnership business<sup>14</sup>.

1 As to the accountability of trustees who profit from the trust see PARA 928 post.

2 See PARA 927 post. 'May possibly conflict' means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict: *Boardman v Phipps* [1967] 2 AC 46 at 124, [1966] 3 All ER 721 at 756, HL, per Upjohn LJ. Once a fiduciary's powers have ceased the rule will no longer apply; hence, a director who has resigned office is no longer subject to the 'no conflict' rule: *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704; *Quarter Master UK Ltd v Pyke* [2004] EWHC 1815 (Ch), [2005] 1 BCLC 245; *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523. However, resignation will not preclude a director from liability where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunity sought by a company: *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, [2001] All ER (D) 294 (May). A director is not in breach where either the company's hope of obtaining the contract was not a maturing business opportunity, or where the resignation was not itself prompted or influenced by a wish to obtain the business for the retiring director: *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, [2007] All ER (D) 213 (Mar).

3 See *Swain v Law Society* [1981] 3 All ER 797 at 813, [1982] 1 WLR 17 at 36, CA, per Oliver LJ.



4 *Swain v Law Society* [1981] 3 All ER 797 at 814, [1982] 1 WLR 17 at 37, CA, per Oliver LJ (approved [1983] 1 AC 598 at 619, [1982] 2 All ER 827 at 838, HL, per Lord Brightman, although the House of Lords reversed the decision of the Court of Appeal on the basis that the Law Society was performing a public duty). See also *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Alimand Computer Systems v Radcliffes & Co* (1991) Times, 6 November; *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, [1999] 1 BCLC 385, CA; *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch), [2005] All ER (D) 346 (Dec). See further EQUITY vol 16(2) (Reissue) PARA 858. There is no generally agreed definition of 'fiduciary relationship' but see *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698, CA; *MacLean v Arklow Investments Ltd* [2000] 1 WLR 594, PC; and PARA 1084 post. See also Snell's Equity (31st Edn, 2005) pp 147-148.

5 *Sergeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA; *Edge v Pensions Ombudsman* [1998] Ch 512, [1998] 2 All ER 547 (affd [2000] Ch 602, [1999] 4 All ER 546, CA).

6 *Re Drexel Burnham Lambert Pension Plan* [1995] 1 WLR 32, where the matter arose in connection with a pension scheme under which a trustee was himself an employee and a member of the scheme. This particular situation is now the subject of a statutory exception to the rule: see the Pensions Act 1995 s 39; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 794.

7 *Lister & Co v Stubbs* (1890) 45 ChD 1, CA (court refused an interlocutory injunction to freeze assets purchased with bribe money as there was no proprietary interest in them). See PARA 618 note 4 ante. See also *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, CA; *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA; *Islamic Republic of Iran Shipping Lines v Denby* [1987] 1 Lloyd's Rep 367. As to the remedy of account for breach of trust see PARA 1109 post; and as to the jurisdiction to grant injunctions to freeze assets see CIVIL PROCEDURE vol 11 (2009) PARAS 396-401.

8 *Re Lister & Co v Stubbs* (1890) 45 ChD 1, CA: see the text and note 7 supra. See also PARA 618 note 4 ante.

9 See *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC. See also *A-G's Reference (No 1 of 1985)* [1986] QB 491, [1986] 2 All ER 219, CA; and PARA 618 note 4 ante.

10 *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119, [2005] 4 All ER 73; *Cave v Mackenzie* (1877) 46 LJ Ch 564; *Re Cape Breton Co* (1885) 29 ChD 795 at 803-804, CA; *Griffith v Owen* [1907] 1 Ch 195; *Longfield Parish Council v Robson* (1913) 29 TLR 357; *Cook v Deeks* [1916] 1 AC 554, PC; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443. For analysis of the proprietary remedy in recent cases on personal exploitation of commercial opportunities see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1343]-[1356], [2005] All ER (D) 397 (Jul) at [1343]-[1356] per Lewison J.

11 *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054; *Re Llewellyn's Will Trusts, Griffiths v Wilcox* [1949] Ch 225, [1949] 1 All ER 487. See also PARA 928 note 1 post.

12 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378, HL; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Gwembe Valley Development Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131.

13 See *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA; and PARAS 936, 1060 post. As to the accountability of directors for profits made out of their company see COMPANIES vol 14 (2009) PARAS 550, 586, 660. See also *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, PC (where the court took a more favourable view of a director who had taken advantage of an opportunity which a fully informed board of directors had rejected). For the distinction between the position of de facto and shadow directors see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1289]-[1291], [2005] All ER (D) 397 (Jul) at [1289]-[1291] per Lewison J.

14 *Aas v Benham* [1891] 2 Ch 244, CA; approved in *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL. A solicitor is under no duty to his client to account for profit from a joint venture in circumstances where the client understands the terms and effect of the agreement and those terms are fair: *Hanson v Lorenz and Jones* [1987] 1 FTLR 23, (1986) 136 NLJ 1088, CA. See also PARTNERSHIP vol 79 (2008) PARA 107.

## UPDATE

### 697 Profits from trust property or fiduciary relationship

NOTE 13--See *Cobbetts LLP v Hodge* [2009] EWHC 786 (Ch), [2010] 1 BCLC 30 (no remuneration allowed for work and skill where fiduciary had misled beneficiary).

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### **C. THIRD PARTIES AS CONSTRUCTIVE TRUSTEE**

#### **698. Intermeddling with trust.**

A person who, not being a trustee<sup>1</sup> and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee makes himself a trustee de son tort, that is a trustee by virtue of his own wrongdoing, or, as such a person is also called, a constructive trustee<sup>2</sup>. The responsibility which attaches to a trustee may extend in equity to a person who is not properly a trustee if he either makes himself a trustee de son tort or actually participates in any improper conduct of a trustee to the injury of the beneficiaries<sup>3</sup>.

A person who is employed as solicitor or agent for trust property may become a constructive trustee or trustee de son tort by intermeddling with the performance of the trust<sup>4</sup>, or by dealing with the property in a manner not warranted by the terms of his employment or agency<sup>5</sup>, or in a manner inconsistent with the performance of trusts of which he is cognisant<sup>6</sup>. A person does not, however, become a constructive trustee merely by acting as the solicitor or agent of trustees in transactions within their legal powers, even though the transactions may be of a character of which a court of equity would disapprove, unless he receives and becomes chargeable with some part of the trust property, or unless he dishonestly assists in a breach of trust on the trustees' part<sup>7</sup>. The law is reluctant to make a mere agent a constructive trustee: there must be a want of probity<sup>8</sup>.

1 A person whose acts are referable to his appointment as a trustee is not to be deemed a trustee de son tort: *Mara v Browne*[1896] 1 Ch 199 at 207, CA, per Lord Herschell.

2 *Re Barney, Barney v Barney*[1892] 2 Ch 265; *Mara v Browne*[1896] 1 Ch 199 at 209, CA, per AL Smith LJ; *Williams-Ashman v Price and Williams*[1942] Ch 219, [1942] 1 All ER 310; *Selangor United Rubber Estates Ltd v Cradock (No 3)*[1968] 2 All ER 1073 at 1095, [1968] 1 WLR 1555 at 1579; *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*[1969] 2 Ch 276, [1969] 2 All ER 367, CA. A person who, without having been validly appointed, acts as trustee is liable as such: *Rackham v Siddall* (1849) 1 Mac & G 607 at 621 per Lord Cottenham LC; *Pearce v Pearce* (1856) 22 Beav 248; *Hennessey v Bray* (1863) 33 Beav 96 at 102. If a person, not expressly a trustee, buys property or otherwise enters into transactions with the money of another, the law raises a trust by implication and clothes that person with a fiduciary character for the purpose of making him accountable: *Docker v Somes* (1834) 2 My & K 655 at 665 per Lord Brougham LC. Cf *Re Franklyn, Franklyn v Franklyn* (1913) 30 TLR 187, CA. An executor de son tort who had behaved as if he were the sole owner of his intestate father's property for some 25 years was held to be a constructive trustee for the beneficiaries under the intestacy (including himself) in *James v Williams*[2000] Ch 1, [1999] 3 All ER 309, CA.

3 *Portlock v Gardner* (1842) 1 Hare 594 at 606; *A-G v Leicester Corp'n* (1844) 7 Beav 176; *Bridgman v Gill* (1857) 24 Beav 302; *Rolfe v Gregory* (1865) 4 De GJ & Sm 576; *Barnes v Addy*(1874) 9 Ch App 244 at 251-252 per Lord Selborne LC; *Re Bell, Lake v Bell*(1886) 34 ChD 462; *Soar v Ashwell*[1893] 2 QB 390, CA. As to participation in breaches of trust giving rise to liability see PARA 704 post.

4 *Myler v FitzPatrick* (1822) 6 Madd 360; *Hardy v Caley* (1864) 33 Beav 365; *Archer v Lavender*(1875) IR 9 Eq 220 at 225.

5 *Morgan v Stephens* (1861) 3 Giff 226; *Lee v Sankey*(1873) LR 15 Eq 204.

6 *Lee v Sankey*(1873) LR 15 Eq 204 at 211 per Bacon V-C; and see PARA 703 post. As to the wrongful acts which will make an agent liable as a constructive trustee see *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 304, [1969] 2 All ER 367 at 384, CA, per Davies LJ.

7 *Barnes v Addy*(1874) 9 Ch App 244 at 251-252; *Archer v Lavender*(1875) IR 9 Eq 220 at 225 per Chatterton V-C. This paragraph was cited with approval by Danckwerts LJ in *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 290, [1969] 2 All ER 367 at 373, CA, but these dicta must now be read in the light of *Royal Brunei Airlines Sdn Bhd v Tan*[1995] 2 AC 378, [1995] 3 All ER 97, PC: see PARA 704 post.

A person employed as agent of trustees is not accountable to beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent: *Williams-Ashman v Price and Williams*[1942] Ch 219, [1942] 1 All ER 310. The fact that a person has had trust funds in his hands as solicitor to the trustees does not make him chargeable as a constructive trustee: see PARA 703 post. As to the liability of a firm of solicitors where one partner concurs in a breach of trust or constitutes himself a constructive trustee see LEGAL PROFESSIONS vol 66 (2009) PARA 825.

8 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)*[1969] 2 Ch 276, [1969] 2 All ER 367, CA; *Eagle Trust plc v SBC Securities Ltd*[1992] 4 All ER 488, [1993] 1 WLR 484.

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### 699. Receipt without notice of trust.

A person who, without notice of the trust, acquires property or an interest in property which is in fact subject to a subsisting trust takes the property as a trustee and subject to the performance of the trust if he acquires gratuitously either the legal estate<sup>1</sup> or an equitable interest in the property<sup>2</sup>, or if he acquires for valuable consideration an equitable interest in the property without the right to call for the legal estate<sup>3</sup>. In the latter case, however, he can protect himself from the trust by afterwards getting in the legal estate from a person who commits no breach of trust in parting with it to him<sup>4</sup>, although he cannot do so by obtaining the legal estate from a person who is not justified in equity in transferring it to him<sup>5</sup>. However, he takes the property discharged from the trust, provided that he can show that he had no notice of it, if he acquires the legal estate in the property for valuable consideration<sup>6</sup>, or acquires an equitable interest in it for valuable consideration and at the same time acquires a paramount right to call for the legal estate<sup>7</sup>. Even if he no longer has the trust property or its traceable proceeds<sup>8</sup>, a person who has acquired the trust property may be liable as a constructive trustee on the basis of knowing receipt or dealing<sup>9</sup>. However, a recipient of trust money will not be personally liable if he pays it away to a third party where at the date of payment he was ignorant of the existence of the trust<sup>10</sup>.

1 Where property is subject to a trust, the trust follows the legal estate wherever it goes, unless it comes into the hands of a purchaser for valuable consideration without notice: *A-G v Lady Downing* (1767) Wilm 1 at 21 per Wilmot CJ. See also PARA 659 text and note 5 ante.

2 *Taylor v Blakelock* (1886) 32 ChD 560 at 568-570, CA.

3 *Maundrell v Maundrell* (1805) 10 Ves 246 at 260; *Newton v Newton* (1868) 4 Ch App 143; *Mumford v Stohwasser* (1874) LR 18 Eq 556.

4 *Maundrell v Maundrell* (1805) 10 Ves 246 at 260; *Carter v Carter* (1857) 3 K & J 617; *Bates v Johnson* (1859) John 304; *Sharples v Adams* (1863) 32 Beav 213 at 216 per Romilly MR; *Taylor v Russell* [1892] AC 244, HL; *Bailey v Barnes* [1894] 1 Ch 25 at 37, CA; *McCarthy and Stone Ltd v Julian S Hodge & Co Ltd* [1971] 2 All ER 973 at 981, [1971] 1 WLR 1547 at 1556. He can protect himself even though he gets in the legal estate after he has notice of the trust: *Bailey v Barnes* supra. Where a purchaser for value without notice of an equitable title acquires an inchoate title and after notice completes it by getting in the legal estate, he will not as an ordinary rule be deprived, in favour of a person having only an equitable title, of the advantage which he has thereby gained: *Dodds v Hills* (1865) 2 Hem & M 424; *Roots v Williamson* (1888) 38 ChD 485 at 497-498 per Stirling J. In relation to mortgages, the application of the principle that the purchaser can protect himself against equitable interests by getting in the legal estate has been affected by the abolition of the doctrine of tacking so far as it enabled one incumbrancer to obtain priority over another by getting in the legal estate: see EQUITY vol 16(2) (Reissue) PARA 574; MORTGAGE vol 77 (2010) PARAS 264, 265.

5 *Sharples v Adams* (1863) 32 Beav 213 at 216.

6 *Thorndike v Hunt, Browne v Butter* (1859) 3 DeG & J 563; *Pilcher v Rawlins* (1872) 7 Ch App 259; *Heath v Crealock* (1874) 10 Ch App 22; *Taylor v Blakelock* (1886) 32 ChD 560, CA. See also EQUITY vol 16(2) (Reissue) PARA 570. Absence of notice of the trust is essential to his immunity from liability: *Lady Bodmin v Vandenbendy* (1683) 1 Vern 179; *Anon* (1683) 2 Vent 361. A subsequent purchaser from him is not affected by notice of the trust, as the property has been discharged from it by the previous purchase without notice: *Brandlyn v Ord* (1738) 1 Atk 571; *Lowther v Carlton* (1741) 2 Atk 242; *M'Queen v Farquhar* (1805) 11 Ves 467 at 478 per Lord Eldon LC; *Wilkes v Spooner* [1911] 2 KB 473, CA. The only exception to the rule which protects a purchaser with notice who takes from a purchaser without notice is that which prevents a trustee from buying back trust property which he has sold, or a person who has acquired property by fraud from saying that he sold it to a

purchaser in good faith without notice and has repurchased it from him: *Barrow's Case* (1880) 14 ChD 432 at 445, CA, per Jessel MR.

7 *Wilkes v Bodington* (1707) 2 Vern 599; *Stanhope v Earl Verney* (1761) 2 Eden 81; *Wilmot v Pike* (1845) 5 Hare 14 at 22 per Wigram V-C; *Rooper v Harrison* (1855) 2 K & J 86; *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 at 262-263, CA, per Stirling LJ.

8 As to tracing see PARA 1134 post; and EQUITY vol 16(2) (Reissue) PARAS 861-866.

9 See PARAS 700-701 post.

10 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705, [1996] 2 All ER 961 at 988, HL, per Lord Browne-Wilkinson; *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 23, [1996] 4 All ER 698 at 716-717, CA, per Millett LJ.

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## **700. Receipt with notice of trust.**

Where a person, whether gratuitously or for valuable consideration, acquires property or an interest in property which is subject to a subsisting trust, he becomes a trustee of it for the purposes of the trust if he has either actual or constructive notice of the trust<sup>1</sup>. If he has parted with the property, he may yet be liable as a constructive trustee on the basis of knowing receipt or dealing<sup>2</sup>.

In the absence of fraud, a trustee<sup>3</sup> or personal representative<sup>4</sup> acting for the purposes of more than one trust<sup>5</sup> or estate is not affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice of it merely by reason of his acting or having acted for the purposes of another trust or estate<sup>6</sup>.

1 *Saunders v Dehew* (1692) 2 Vern 271; *Thompson v Simpson* (1841) 1 Dr & War 459 at 486; *Allen v Knight* (1847) 11 Jur 527; *Rolfe v Gregory* (1865) 4 De GJ & Sm 576; *Baillie v M'Kewan* (1865) 35 Beav 177; *Boursot v Savage* (1866) LR 2 Eq 134; *Mumford v Stohwasser* (1874) LR 18 Eq 556; *Nelson v Larholt* [1948] 1 KB 339, [1947] 2 All ER 751 (where cheques were drawn on an executor's account for the executor's own purposes, and the recipient had notice of want of authority).

The sentence in the text was approved as correctly stating the law by Danckwerts LJ in *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 290, [1969] 2 All ER 367 at 372, CA (mere knowledge of a claim that a trust existed held not to be sufficient to amount to notice of a trust).

A person buying real estate with notice of the rights of another in it is a trustee for him in respect of it: *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, PC. As to what is constructive notice see *Cookson v Lee* (1853) 23 LJ Ch 473, CA; *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA. See also the Law of Property Act 1925 s 199; the Land Charges Act 1972 s 18(6); and EQUITY vol 16(2) (Reissue) PARA 580. A person is held to have constructive notice of the trust if he abstains from making proper inquiries which would have led to his discovering its existence: *Justice v Wynne* (1860) 12 I Ch R 289, CA. See also *Williams v Williams* (1881) 17 ChD 437. Constructive notice is as good as any other notice: *Cookson v Lee* supra at 478 per Lord Cranworth LC. See further EQUITY vol 16(2) (Reissue) PARAS 580-583.

2 See PARA 701 post.

3 For the meaning of 'trustee' see PARA 601 ante.

4 For the meaning of 'personal representative' see PARA 602 note 1 ante.

5 For the meaning of 'trust' see PARA 601 ante.

6 Trustee Act 1925 s 28.

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## 701. Knowing receipt or dealing: recipient liability.

A recipient may be liable where he (1) knowingly receives trust property in breach of trust ('receipt of property constructive trust'); or (2) receives trust property without notice of the trust and subsequently deals with it in a manner inconsistent with the trusts of which he has become cognisant ('wrongful dealing constructive trust'); or (3) receives trust property knowing it to be such but without breach of trust and subsequently deals with it in a manner inconsistent with the trusts<sup>1</sup>.

Head (3) above relates to a person, usually an agent of the trustees, who receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the trust property knowing it to be such, although he will not necessarily be required in all circumstances to have known the exact terms of the trust<sup>2</sup>.

Heads (1) and (2) above relate to a person who receives<sup>3</sup> for his own benefit trust property transferred to him in breach of trust. The claimant in these situations must show (a) a disposal of his assets in breach of fiduciary duty; (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant; and (c) knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty<sup>4</sup>. The receipt must be the direct consequence of the alleged breach of trust or fiduciary duty of which the recipient is said to have notice<sup>5</sup>. It is immaterial whether the breach of trust was fraudulent or not<sup>6</sup>.

1 As to the division into categories see *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291-293, [1992] 4 All ER 385 at 403-405 per Millett J (affd [1991] Ch 547, [1992] 4 All ER 451, CA); *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 474, [1989] 3 All ER 14 at 53, CA, per Slade LJ. See also *Re Montagu's Settlement Trusts*, *Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, [1992] 4 All ER 308; *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 331, [1987] 1 WLR 987 (revsd in part [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; revsd in part [1991] 2 AC 548, [1992] 4 All ER 512, HL (relying on the law of restitution: see RESTITUTION)); *Baden v Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France SA* [1992] 4 All ER 161, [1993] 1 WLR 509n (affd without the question of constructive trust being raised [1992] 4 All ER 279n, CA). See further *Lee v Sankey* (1873) LR 15 Eq 204; *Barnes v Addy* (1874) 9 Ch App 244; *Re Barney v Barney*, *Barney* [1892] 2 Ch 265; *Soar v Ashwell* [1893] 2 QB 390, CA; *Re Eyre-Williams*, *Williams v Williams* [1923] 2 Ch 533; *Nelson v Larholt* [1948] 1 KB 339, [1947] 2 All ER 751; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 3 All ER 540, [1958] 1 WLR 1216, CA; *Westpac Banking Corp v Savin* [1985] 2 NZLR 41, NZ CA; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652, [1999] 1 BCLC 385, CA. These cases must now be read, in relation to knowledge, in the light of *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA. However, see also *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, [2006] 1 BCLC 729, HL (true issue was whether or not the directors had actual or apparent authority to enter into the agreement; Lord Nicholls of Birkenhead said at [1]-[5] that the 'Court of Appeal in Akindele's case had fallen into error on this point'). As to the liability of agents see PARA 703 post.

2 *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406.

3 *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 291-292, [1992] 4 All ER 385 at 403-404 per Millett J; affd [1991] Ch 547, [1992] 4 All ER 451, CA. The court will pierce the corporate veil and recognise the receipt by a company as that of the individual in control of it if the company is used as a device or façade to conceal the



true facts thereby avoiding or concealing any liability of those individuals: *Trustor AB v Smallbone (No 2)* [2001] 3 All ER 987, [2001] 1 WLR 1177. See also *Houghton v Fayers* [2000] 1 BCLC 511, (2000) Times, 9 February, CA.

4 *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700, [1994] 1 BCLC 464 at 478, CA, per Hoffman LJ; *Brown v Bennett* [1999] 1 BCLC 649, [1999] BCC 525, CA; *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA. As to the type of knowledge which is required see PARA 702 post.

5 See *Brown v Bennett* [1999] 1 BCLC 649 at 655, [1999] BCC 525 at 530, CA, per Morritt LJ.

6 *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 292, [1992] 4 All ER 385 at 404 per Millett J (affd without considering the question of constructive trust [1991] Ch 547, [1992] 4 All ER 451, CA); *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 777, CA, per Scott LJ; *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA.

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## **702. 'Receipt of property constructive trust' and 'wrongful dealing constructive trust'; type of knowledge or notice required.**

In order to constitute a person who takes trust property or trust money for his own purposes a constructive trustee of it, he must have knowledge or notice that it is trust property or trust money and that it is being misapplied by being transferred to him or that his dealing with the property or money is a misapplication of it<sup>1</sup>. Accordingly, a recipient of trust money will not be personally liable if he pays it away to a third party where at the date of payment he was ignorant of the existence of the trust<sup>2</sup>.

The court has referred to a fivefold categorisation of knowledge<sup>3</sup>. However, the Court of Appeal has said that there should be a single test of knowledge for knowing receipt, under which all that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt<sup>4</sup>. A test in that form, though it cannot any more than any other avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led<sup>5</sup>.

Dishonesty on the part of the defendant is not a necessary ingredient of liability in knowing receipt. It is only necessary to show that the defendant knew that the moneys paid to him were trust moneys and of circumstances which made the payment a misapplication of them. It is not necessary to show that the defendant was in any sense a participator in a fraud<sup>6</sup>, nor is there any requirement that the misapplication of trust funds should be fraudulent<sup>7</sup>. In the case of a company, the knowledge can be that of a director<sup>8</sup> or person who is the company's directing mind and will<sup>9</sup>.

1 *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437, [2000] 4 All ER 221, CA. See also *Colchester Corp'n v Lowten* (1813) 1 Ves & B 226 at 246 per Lord Eldon LC; *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 at 479 per Jessel MR; *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370; *Moxham v Grant* [1900] 1 QB 88, CA. A distinction should be drawn between the equitable doctrine of tracing where the doctrine of notice is relevant and the imposition of a constructive trust by reason of the knowing receipt of trust property where the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of a constructive trust creating personal obligations; and this depends primarily on the knowledge of the recipient and not on notice to him: *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, [1992] 4 All ER 308. See also *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 290, [1969] 2 All ER 367 at 372, CA (where knowledge of a claim that a trust existed was held not sufficient to amount to notice of misapplication); *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, CA.

2 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705-706, [1996] 2 All ER 961 at 988, HL, per Lord Browne-Wilkinson; *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at 23, [1996] 4 All ER 698 at 716-717, CA, per Millett LJ.

3 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1993] 1 WLR 509n; affd [1992] 4 All ER 279n, CA (where the claim in constructive trust was based squarely on knowing assistance and not on knowing receipt). The categories were namely: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious ('Nelsonian knowledge'); (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; (4) knowledge of circumstances which would indicate the facts to an honest and reasonable person; (5) knowledge of circumstances which would put an honest person on inquiry. In general, the first three categories were taken to constitute actual knowledge or its equivalent, and the last two constructive knowledge: see *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* supra. See also *Re Montagu's*

*Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, [1992] 4 All ER 308; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, [1992] 4 All ER 385 (affd without considering the question of constructive trust [1991] Ch 547, [1992] 4 All ER 451, CA); *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488, [1993] 1 WLR 484; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, CA. See further *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 331, [1987] 1 WLR 987 (revsd in part [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; revsd in part [1991] 2 AC 548, [1992] 4 All ER 512, HL); *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. In considering whether a particular person is to be treated as having had the requisite knowledge, the court must have regard to the attributes of that person: *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551; *Re Clasper Group Services Ltd* [1989] BCLC 143. See also *Jonathan v Tilley* (30 June 1995) Lexis, CA; *Dubai Aluminium Ltd v Salaam* [1999] 1 Lloyd's Rep 415. It has been held that in commercial transactions not involving the purchase of land the courts will not readily import a duty to make inquiries (*Manchester Trust v Furness* [1895] 2 QB 539, CA; *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com LR 251), but will do so, on the basis of what a reasonable person would have learnt, to a person who is guilty of commercially unacceptable conduct in the particular context involved (*Cowan de Groot Properties Ltd v Eagle Trust plc* supra at 761 per Knox J).

4 See *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437 at 455, [2000] 4 All ER 221 at 235, CA, per Nourse LJ, who said that the purpose of categorisation could only be to enable the court to determine whether the recipient can conscientiously retain the funds against the company (see *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405, CA, per Buckley LJ) or whether the recipient's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee (see *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264 at 273, [1992] 4 All ER 308 at 319 per Megarry V-C). But if that is the purpose, there is no need for categorisation.

5 *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437 at 455, [2000] 4 All ER 221 at 235-236, CA, per Nourse LJ.

6 *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA; *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437 at 448-450, [2000] 4 All ER 221 at 229-231, CA; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 501, [1993] 1 WLR 484 at 497.

7 *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 292, [1992] 4 All ER 385 at 404 (affd without considering the question of constructive trust [1991] Ch 547, [1992] 4 All ER 451, CA); *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 501, [1993] 1 WLR 484 at 497 per Vinelott J; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 777, CA, per Scott LJ.

8 *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [193], [2004] 1 BCLC 468 at [193] per Peter Smith J.

9 *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [194], [2004] 1 BCLC 468 at [194] per Peter Smith J. See also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 705-707, [1994] 1 BCLC 464 at 482-484 per Hoffman LJ.

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### 703. Receipt of trust money.

The law is reluctant to make a mere agent a constructive trustee. Accordingly, a banker, broker, solicitor or other third party to the trust who lawfully receives money, not for his own benefit, from a trustee which he knows to be part of the trust property does not become a constructive trustee of it in relation to the beneficiaries<sup>1</sup> unless he either misappropriates it or is guilty of some other wrongful act in relation to that money. To act wrongfully he must be guilty of: (1) knowingly participating in a breach of trust by his principal; or (2) intermeddling with the trust property otherwise than merely as an agent and thereby becoming a trustee de son tort<sup>2</sup>; or (3) receiving or dealing with the money knowing that his principal has no right to pay it over or to instruct him to deal with it in the manner indicated; or (4) some dishonest act relating to the money<sup>3</sup>.

Mere notice of a claim asserted by a third party is insufficient to render the agent guilty of a wrongful act in dealing with property derived from his principal in accordance with the latter's instructions unless the agent knows that the third party's claim is well-founded and that the principal accordingly had no authority to give such instructions<sup>4</sup>. Professionals and agents who have received moneys as such and have acted bona fide are accountable only to their principals unless dishonesty as well as cognisance of trusts is established against them<sup>5</sup>.

1 *Keane v Robarts* (1819) 4 Madd 332; *Maw v Pearson* (1860) 28 Beav 196; *Harries v Rees* (1867) 37 LJ Ch 102 at 106-107 per Rolt LJ; *Gray v Johnston* (1868) LR 3 HL 1; *Barnes v Addy* (1874) 9 Ch App 244 at 251-252 per Lord Selborne LC; *Re Spencer, Spencer v Hart* (1881) 51 LJ Ch 271, CA; *Stanier v Evans, Evans v Stanier* (1886) 34 ChD 470; *Re Jackson, Re Cottrell, Boughton-Leigh v Boughton-Leigh* (1889) 40 ChD 495; *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL; *Brinsden v Williams* [1894] 3 Ch 185; *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243; *Plaskitt v Eddis* (1898) 79 LT 136; *Union Bank of Australia v Murray-Aynsley* [1898] AC 693, PC; *Mutton v Peat* [1899] 2 Ch 556 at 561; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; *Lord Napier and Ettrick and Richards Butler v RF Kershaw Ltd* [1993] 1 Lloyd's Rep 10, CA (revsd in part without discussion of this point [1993] AC 713, [1993] 1 All ER 385, HL). See *Soar v Ashwell* [1893] 2 QB 390, CA. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 817, 843. As to the extent to which the relationship between a solicitor, banker or broker and his client is a trust relationship see PARA 619 et seq ante; and as to the position of a solicitor or agent who intermeddles with a trust see PARA 698 ante.

2 See PARA 698 ante.

3 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276 at 290, [1969] 2 All ER 367 at 372, CA; *Pannell v Hurley* (1845) 2 Coll 241; *Salomons v Laing* (1850) 12 Beav 377; *Bodenham v Hoskyns* (1852) 2 De GM & G 903; *Bridgman v Gill* (1857) 24 Beav 302; *Morgan v Stephens* (1861) 3 Giff 226 at 237 per Stuart V-C; *Lee v Sankey* (1873) LR 15 Eq 204 at 211 per Bacon V-C; *Barnes v Addy* (1874) 9 Ch App 244; *Williams v Williams* (1881) 17 ChD 437; *Re Bell, Lake v Bell* (1886) 34 ChD 462; *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370 at 381 per Stirling J; *Blyth v Fladgate* [1891] 1 Ch 337; *Soar v Ashwell* [1893] 2 QB 390, CA; *Mara v Browne* [1896] 1 Ch 199, CA; *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA; *Williams-Ashman v Price and Williams* [1942] Ch 219, [1942] 1 All ER 310; *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488, [1993] 1 WLR 484; *Lord Napier and Ettrick and Richards Butler v RF Kershaw Ltd* [1993] 1 Lloyd's Rep 10, CA (revsd in part without discussion of this point [1993] AC 713, [1993] 1 All ER 385, HL).

4 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, [1969] 2 All ER 367, CA; and see *Williams v Williams* (1881) 17 ChD 437; *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370; *Manchester Trust v Furness* [1895] 2 QB 539 at 545, CA; *Williams-Ashman v Price and Williams* [1942] Ch 419, [1942] 1 All ER 310; *Feuer Leather Corp v Frank Johnstone & Sons* [1981] Com LR 251; *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1993] 1 WLR 509n (affd [1992] 4 All ER 279n, CA). As to the necessity for knowledge see further PARA 702 ante. For a discussion of the

correct procedure where a solicitor suspects that a third party may have a claim to money in the client bank account see *Antonelli v Allen* [2000] All ER (D) 2040 per Neuberger J.

5     *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, [1969] 2 All ER 367, CA; *Lord Napier and Ettrick and Richards Butler v RF Kershaw Ltd* [1993] 1 Lloyd's Rep 10, CA (revsd in part without discussion of this point [1993] AC 713, [1993] 1 All ER 385, HL).

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#### **704. Dishonest assistance in breach of trust: accessory liability.**

A third party to a trust who has received no trust property personally can be liable if he has provided dishonest assistance in a breach of a trust. Unlike recipient liability, liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in the sense that it only arises where there has been a breach of trust<sup>1</sup>.

There must be a trust<sup>2</sup>. Despite earlier decisions that a dishonest and fraudulent design on the part of the trustees of the trust was necessary<sup>3</sup>, the Privy Council has held that it is not necessary for the initial breach to be a dishonest and fraudulent breach by the trustee<sup>4</sup>. The stranger to the trust must act dishonestly<sup>5</sup>. Whatever may be the position in some criminal or other contexts<sup>6</sup>, in the context of accessory liability acting dishonestly means simply not acting as an honest person would in the circumstances. It is an objective standard. However, there are subjective elements in that it is assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated<sup>7</sup>.

Merely being present while someone else carries out a task does not amount to assistance<sup>8</sup>.

In the case of a company, the requisite dishonesty can be that of a director<sup>9</sup> or person who is the company's directing mind and will<sup>10</sup>.

1 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 [1995] 3 All ER 97, PC; *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, [2006] 1 WLR 1476. See *Eaves v Hickson* (1861) 30 Beav 136; *Barnes v Addy* (1874) 9 Ch App 244 at 251-252 per Lord Selborne LC; *Soar v Ashwell* [1893] 2 QB 390, CA; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405, CA; and see also *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, [1969] 2 All ER 367, CA; *Competitive Insurance Ltd v Davies Investments Ltd* [1975] 3 All ER 254, [1975] 1 WLR 1240; *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank plc* [1987] Ch 264, [1992] 4 All ER 308; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488, [1993] 1 WLR 484; *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 420, [1989] 1 WLR 1340 at 1355, CA, per May LJ (revsd in part [1991] 2 AC 548, [1992] 4 All ER 512, HL (relying on the law of restitution: see RESTITUTION)); *Agip (Africa) Ltd v Jackson* [1990] Ch 265, [1992] 4 All ER 385 (affd [1991] Ch 547, [1992] 4 All ER 451, CA); *Arab Monetary Fund v Hashim (No 2)* [1990] 1 All ER 673, DC; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, CA; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] All ER (D) 283 (Apr).

2 The trust need not be a formal trust. It is sufficient that there should be a fiduciary relationship between the trustee and the property of another person. Thus directors of a company in consequence of the fiduciary character of the duties which they owe to the company are treated as if they were the trustees of the company's property under their control (*Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210, [1972] 1 WLR 602) as are employees whose fiduciary position within the company gave them control of funds or enabled them to misapply the funds (*Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 566-567, [1992] 4 All ER 451 at 466 per Fox LJ). See also *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 5 ALR 231, Aust HC.

3 There is no distinction between the words 'fraudulent' and 'dishonest': *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA.

4 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC; followed in *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377. See also *Fyler v Fyler* (1841) 3 Beav 550 at 568;

*A-G v Leicester Corp* (1844) 7 Beav 176 at 179; *Eaves v Hickson* (1861) 30 Beav 136. What matters is the state of mind of the third party, not the state of mind of the trustee. The trustee will be liable in any event for the breach of trust, even if he acted innocently, unless excused by an exemption clause in the trust instrument or relieved by the court: *Royal Brunei Airlines Sdn Bhd v Tan* supra at 385 and 102.

It is usual to join the trustee or fiduciary whose liability is alleged to be the principal liability: *Yeshiva Properties No 1 Pty Ltd v Marshall* [2005] NSWCA 23, 7 ITELR 577 (per curiam). It is doubtful whether an equitable remedy against an alleged accessory should be granted to a claimant who has given the alleged defaulting trustee or fiduciary a release, or has decided not to sue the trustee or fiduciary: *Yeshiva Properties No 1 Pty Ltd v Marshall* supra.

5 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC; *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, [2006] 1 WLR 1476. 'Knowingly', is a term better avoided as a defining ingredient of accessory liability and in this context the fivefold classification of knowledge adopted in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1982) [1992] 4 All ER 161, [1983] BCLC 325 is best forgotten: see *Royal Brunei Airlines Sdn Bhd v Tan* supra at 392 and 109. See also *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] WTLR 1, [2006] All ER (D) 80 (Nov).

6 See *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2005 Reissue) PARA 283.

7 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC; (followed in *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377; and explained in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333, [2006] 1 WLR 1476, PC). This does not mean it is necessary to inquire into the views of the defendant about 'generally acceptable standards of honest conduct'. The defendant's 'knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were': *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* supra at [15] per Lord Hoffmann. The Court of Appeal has accepted that the law as laid down in *Twinsectra v Yardley* supra as interpreted in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* supra represents the law in England and Wales: see *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 at [69], [2007] WTLR 1 at [69], [2006] All ER (D) 80 (Nov) at [69] per Arden LJ. See further *A-G of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch).

8 See *Brinks Ltd v Abu-Saleh (No 3)* (1995) Times, 23 October, Ch, where Rimer J suggested that for a person to be liable in equity as an accessory to a breach of trust, he must have given the relevant assistance in the knowledge of the existence of the trust or, at least, of the facts which gave rise to the trust.

9 *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [178]-[187], [2004] 1 BCLC 468 at [178]-[187] per Peter Smith J.

10 *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) at [188]-[196], [2004] 1 BCLC 468 at [188]-[196] per Peter Smith J. See also *El Ajou v Dollar Land Holdings plc* [1994] 1 BCLC 464 at 484, CA, per Hoffman LJ. See also *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] All ER (D) 283 (Apr).

## UPDATE

### 704 Dishonest assistance in breach of trust: accessory liability

NOTES 1, 10--*Sinclair Investments*, cited, reported at [2007] 2 All ER (Comm) 993.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/ (ii) Resulting Trusts/A. IN GENERAL/705. Nature of resulting trust.

## **(ii) Resulting Trusts**

### **A. IN GENERAL**

#### **705. Nature of resulting trust.**

A resulting trust is a trust arising by operation of law<sup>1</sup>. Such a trust arises in two sets of circumstances<sup>2</sup>.

The first set of circumstances occurs where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B. The money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions<sup>3</sup>. This has been described as a presumed resulting trust<sup>4</sup>.

The second set of circumstances occurs where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest<sup>5</sup>. This has been described as an automatic resulting trust<sup>6</sup>.

Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties<sup>7</sup>. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention<sup>8</sup>.

In all these cases the beneficial interest in the property, so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives<sup>9</sup>. However, this presumption can be rebutted by evidence that the transferor intended to part with beneficial ownership<sup>10</sup>.

1 *Duke of Norfolk v Browne* (1697) Prec Ch 80; *Lloyd and Jobson v Spillet* (1741) 2 Atk 148 at 150 per Lord Hardwicke LC. See also EQUITY vol 16(2) (Reissue) PARA 853. As to the saving of resulting trusts from the effect of the requirement that a trust of land must be declared in writing see PARA 625 ante; and as to resulting trusts in the case of charities see CHARITIES vol 8 (2010) PARA 175.

2 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708, [1996] 2 All ER 961 at 990, HL, per Lord Browne-Wilkinson.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708, [1996] 2 All ER 961 at 990, HL, per Lord Browne-Wilkinson. This is a presumption, which can be displaced by the counter-presumption of advancement or rebutted by direct evidence of A's intention to make an outright transfer: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* supra at 708 and 990 per Lord Browne-Wilkinson (citing *Vandervell v IRC* [1967] 2 AC 291 at 312 et seq, [1967] 1 All ER 1 at 8 et seq, HL, per Lord Upjohn; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269 at 288 et seq). But for a different approach where a purchase is by a cohabiting couple see *Stack v Dowden* [2007] UKHL 17 at [31] and [58], [2007] 2 All ER 929 at [31] and [58]. See also PARA 722 post.

4 *Vandervell v IRC* [1967] 2 AC 291 at 312 et seq, [1967] 1 All ER 1 at 8 et seq per Lord Upjohn; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269 at 294, [1974] 1 All ER 47 at 68 per Megarry V-C. See PARA 709 et seq post.



5 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 708, [1996] 2 All ER 961 at 990, HL, per Lord Browne-Wilkinson (citing *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd*[1974] Ch 269 at 295, [1974] 1 All ER 47 at 69 per Megarry V-C). The declared trusts may fail to deal with the beneficial interests in the circumstances that arise (see PARA 707 post) or there may be surplus funds either because the purpose has been achieved or because it has become impossible to achieve the purpose (see PARAS 709, 711-712 post).

6 *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd*[1974] Ch 269 at 295, [1974] 1 All ER 47 at 69 per Megarry V-C. However, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 708, [1996] 2 All ER 961 at 991, HL, Lord Browne-Wilkinson suggested that a settlor could expressly or by necessary implication abandon his beneficial interest, in which case the undisposed of equitable interest would vest in the Crown as bona vacantia. See PARA 625 ante.

7 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 708, [1996] 2 All ER 961 at 990, HL, per Lord Browne-Wilkinson. See, however, *Goodman v Carlton*[2002] EWCA Civ 545 at [29]-[35], [2002] 2 FLR 259 at [29]-[35] per Ward LJ (citing Lord Millet's paper *Restitution and Constructive Trusts* (1988) 114 LQR 399 at 401 and Chambers *Resulting Trusts* (1st Edn, 1997), which suggest that a resulting trust arises whenever a transferor does not intend to benefit the recipient; the trust is a response to the absence of intention to pass the entire beneficial interest as opposed to a positive intention to retain). See also *Drake v Whipp*[1996] 2 FCR 296, [1996] 1 FLR 826, CA.

8 *Westdeutsche Landesbank Girozentral v Islington London Borough Council*[1996] AC 669 at 708, [1996] 2 All ER 961 at 990-991, HL, per Lord Browne-Wilkinson.

9 *Lloyd and Jobson v Spillet* (1741) 2 Atk 148; *Re West, George v Grose*[1900] 1 Ch 84.

10 *Fowkes v Pascoe*(1875) 10 Ch App 343; *Re Young, Trye v Sullivan*(1885) 28 ChD 705; *Aroso v Coutts & Co*[2002] 1 All ER (Comm) 241.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/ (ii) Resulting Trusts/A. IN GENERAL/706. No resulting trust if intention is to part with full beneficial ownership.

## **706. No resulting trust if intention is to part with full beneficial ownership.**

A gift may be expressed to be for a purpose, but if it is clear that the donor has parted with beneficial ownership, there will be no resulting trust of any surplus funds. This is a matter of intention<sup>1</sup>. Where there is a gift by will to a person for a particular purpose, it is a question of construction of the will whether the gift is for a particular purpose only, in which case it gives rise to a resulting trust of any surplus not required for that purpose, or whether it is a gift subject to the performance of a particular purpose, in which case the donee acquires a beneficial interest subject to that purpose<sup>2</sup>.

Similarly, in trusts for creditors, it depends on the intention of the parties as indicated by the language of the deed whether, if the property is more than sufficient for payment of the creditors, the surplus belongs to them or, under a resulting trust, to the debtor<sup>3</sup>.

Where one party pays and the other receives money with the intention that the moneys so paid should become the absolute property of the payee, there can be no resulting trust even if the money is paid under a void contract. There may have been misapprehension that the payment was made in pursuance of a valid contract but that does not alter the actual intentions of the parties at the date of the payment<sup>4</sup>.

<sup>1</sup> *Fowkes v Pascoe* (1875) 10 Ch App 343; *Re Young, Trye v Sullivan* (1885) 28 ChD 705; *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241.

<sup>2</sup> See PARA 726 post. As to the consequences of the failure of the stated charitable objects of a gift see CHARITIES vol 8 (2010) PARA 146 et seq.

<sup>3</sup> *Green v Wynn* (1869) 4 Ch App 204 at 207 per Lord Hatherley LC; *Smith v Cooke, Storey v Cooke* [1891] AC 297 at 299, HL, per Lord Halsbury LC, and at 300 et seq per Lord Herschell.

<sup>4</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708, [1996] 2 All ER 961 at 991, HL, per Lord Browne-Wilkinson.

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## **B. EXPRESS TRUSTS NOT EXHAUSTIVE**

### **707. Trusts declared not exhaustive.**

Where property is conveyed to a trustee upon trusts and the trusts, either as declared by the instrument of conveyance or in the event, do not effectively exhaust<sup>1</sup> the beneficial destination of the property, the remaining beneficial interest in the property results to the disposer and forms part of his real or personal estate, according to the nature of the property<sup>2</sup>. This principle, however, does not apply:

- 47 (1) where a contrary intention is indicated in the instrument of conveyance or is otherwise sufficiently proved<sup>3</sup>; or
- 48 (2) where the presumption of a resulting trust is displaced by the presumption of advancement<sup>4</sup>.

There can be a resulting trust only to the person who was the owner of the property immediately before the settlement<sup>5</sup>. Where property is settled in contemplation of a marriage which is never in fact solemnised, there is a resulting trust of it in favour of the party who settled it<sup>6</sup>. If, however, a man and a woman purchase property in joint names without having a common purpose such as marriage and only the purpose of one of them fails, then a resulting trust according to their respective contributions does not arise<sup>7</sup>.

1 Whether the disposer has disposed effectively of the entire beneficial interest can be a difficult question: see *Re Abbott Fund Trusts*, *Smith v Abbott* [1900] 2 Ch 326 (where there was a resulting trust of a fund for two deaf and dumb women after their deaths); *Re Andrew's Trust*, *Carter v Andrew* [1905] 2 Ch 48 (where there was no resulting trust of a fund for the education of X's children after their education had finished); *Re Osoba*, *Osoba v Osoba* [1979] 2 All ER 393, [1979] 1 WLR 247, CA (where there was no resulting trust of a fund for the maintenance of the widow and the mother and the education of a daughter, the daughter taking absolutely as survivor of three joint tenants).

2 *Carrick v Errington* (1726) 2 P Wms 361; *Birch v Blagrove* (1755) Amb 264; *Hewitt v Wright* (1780) 1 Bro CC 86; *Leslie v Duke of Devonshire* (1787) 2 Bro CC 187; *Cook v Hutchinson* (1836) 1 Keen 42; *Clarke v Franklin* (1858) 4 K & J 257; *Re Wilcock*, *Wilcock v Johnson* (1890) 62 LT 317; *Re Cochrane*, *Shaw v Cochrane* [1955] Ch 309, [1955] 1 All ER 222; *Re Gillingham Bus Disaster Fund*, *Bowman v Official Solicitor* [1958] Ch 300, [1958] 1 All ER 37 (affd on another point [1959] Ch 62, [1958] 2 All ER 749, CA); *Bankes v Salisbury Diocesan Council of Education Inc* [1960] Ch 631, [1960] 2 All ER 372; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269, [1974] 3 All ER 205, CA. See also *Re Guinness's Settlement*, *Guinness v SG Warburg (Executor and Trustee) Ltd* [1966] 2 All ER 497, [1966] 1 WLR 1355; *Hodgson v Marks* [1971] Ch 892 at 933, [1971] 2 All ER 684 at 689, CA. Where, on a marriage, personal property of the wife is settled so as to give a life interest to the husband after her death so long as he remains a widower, he ceases on his remarriage to be entitled to the life interest and there is a resulting trust for the wife's estate: *Re Wyatt*, *Gowan v Wyatt* (1889) 60 LT 920.

3 *Cook v Hutchinson* (1836) 1 Keen 42; *Biddulph v Williams* (1875) 1 ChD 203. The presumption of a resulting trust may be rebutted even by extrinsic evidence: *Cook v Hutchinson* supra at 50 per Lord Langdale MR.

4 See PARAS 715-717 post.

5 Thus where a transaction is really a gift by a father to a child of a portion and a settlement by the child of that portion, the resulting trust is to the child; but where no such antecedent gift is expressed or can be implied

and the father is the settlor, the resulting trust is to the father: see *Re Connell's Settlement*, *Re Benett's Trusts*, *Fair v Connell*[1915] 1 Ch 867 (following *Ward v Dyas* (1835) L & G temp Sugd 177; and explaining *Re Donnelly*[1913] 1 IR 177 at 187).

6 *Thomas v Brennan* (1846) 15 LJ Ch 420; *Mitford v Reynolds, ex p Pattie, ex p India Co* (1848) 16 Sim 130; *Essery v Cowlard*(1884) 26 ChD 191. Where, however, a father settles money and covenants to settle further property on his daughter on her marriage, and the trusts declared do not extend to the event (which happens) of her having no issue and surviving her husband, there is a resulting trust in favour of the daughter and not of the settlor: *Doyle v Crean*[1905] 1 IR 252. See also *Ward v Dyas* (1835) L & G temp Sugd 177.

7 *Burgess v Rawnsley*[1975] Ch 429, [1975] 3 All ER 142, CA.

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### **708. Surplus funds when purpose fails or ends.**

Where a fund is held in trust for a society or a particular purpose, and the society is dissolved or the purpose fails or comes to an end, there may be a resulting trust of the fund subscribed or the surplus, as the case may be, for the contributors to the society or purpose, or, if they are dead, for their personal representatives. Whether there is or is not such a trust depends in general<sup>1</sup> on the intention of the subscribers when they made their contributions, and in particular whether they then parted with their money out and out by way of gift or intended that their contributions or the surplus, if any, should be returned to them if or when the immediate object of the fund failed or came to an end<sup>2</sup>.

Where a fund was intended to be devoted in perpetuity to a particular charitable purpose which has been put into effect but subsequently fails, the charitable trust does not cease and the surplus will be applied *cy-près*<sup>3</sup>. Moreover, where the immediate purpose of the fund is a particular charitable purpose which is of a limited or temporary nature or which fails *ab initio*, but a general charitable intention can be inferred, the surplus of the fund, or the whole fund if the particular purpose fails *ab initio*, will be applied *cy-près*<sup>4</sup>. Where the immediate purpose is a specific charitable purpose which fails *ab initio* and no general charitable intention can be inferred, there is a resulting trust for the subscribers to the fund so far as they can be identified and found<sup>5</sup>, but property given for specific charitable purposes which fail by donors who cannot be identified or found or who have executed written disclaimers of their rights is by statute applicable *cy-près*<sup>6</sup>.

Where the immediate purpose of the trust is not a charitable purpose and that purpose fails<sup>7</sup>, there is a resulting trust for the subscribers of the surplus if the court holds that a return of the surplus must be deemed to have been contemplated<sup>8</sup>; but if the court holds that there is no resulting trust, the surplus belongs to the Crown as *bona vacantia*<sup>9</sup>. If the court holds that there is a resulting trust of the surplus for the subscribers, the surplus is distributable among the subscribers rateably according to the amount of their subscriptions<sup>10</sup>. If, where the trust which has failed was not a charitable trust, any of the subscribers for whom there is a resulting trust cannot be ascertained, the trustees must pay into court the money which would have been payable to those subscribers if ascertained<sup>11</sup>.

Similar questions may arise where there is a surplus on the winding up of a pension scheme. The terms of the scheme will be crucial. A resulting trust will arise in favour of the provider of the funds unless excluded expressly or by implication. Thus it has been held that, in so far as the surplus was derived from the employers' overpayments, there was a resulting trust for them; but a resulting trust was excluded in relation to the employees' contributions because it would lead to an unworkable result and it would conflict with the statutory provisions giving tax advantages to an approved scheme, and, in so far as the surplus was so derived, it devolved as *bona vacantia*<sup>12</sup>. Although there are no special rules of construction applicable to pension schemes, the court's approach to the construction of the relevant documents should be practical and purposive, rather than detached and literal, so as to give reasonable and practical effect to the scheme<sup>13</sup>. The beneficiaries are not volunteers. Their rights have contractual and commercial origins. The benefits provided have been earned by the service of the members and, where the scheme is contributory, by their contributions<sup>14</sup>.

- 1 As to the application of property given for specific charitable purposes which have failed by donors who are unascertainable or have disclaimed their rights see the text and note 6 *infra*.
- 2 See *Re Abbott Fund Trusts, Smith v Abbott* [1900] 2 Ch 326; *Re Welsh Hospital (Netley) Fund, Thomas v A-G* [1921] 1 Ch 655 at 658 per Lawrence J; *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.
- 3 See eg *Re Wokingham Fire Brigade Trusts, Martin v Hawkins* [1951] Ch 373, [1951] 1 All ER 454 (where it was said that it was not necessary to consider whether there was any general intention in such a case); *Re Ulverston and District New Hospital Building Trusts, Birkett v Barrow and Furness Hospital Management Committee* [1956] Ch 622 at 637, [1956] 3 All ER 164 at 172, CA, per Jenkins LJ. See also CHARITIES vol 8 (2010) PARA 208 et seq.
- 4 *Re Welsh Hospital (Netley) Fund, Thomas v A-G* [1921] 1 Ch 655 at 661-662 (distinguishing *Re British Red Cross Balkan Fund, British Red Cross Society v Johnson* [1914] 2 Ch 419, where the question of charitable intention was not considered: see *Barlow Clowes International Ltd (in liquidation) v Vaughan* [1992] 4 All ER 22, CA); *Re Hillier, Hillier v A-G* [1954] 2 All ER 59, [1954] 1 WLR 700, CA; *Re Dover's Battle of Britain Memorial Hospital Fund* (1955) Times, 29 June. As to resulting trusts in case of charities, and as to cy-près application, see CHARITIES vol 8 (2010) PARAS 164 et seq, 208 et seq. See also GIFTS vol 52 (2009) PARA 243.
- 5 *Re Ulverston and District New Hospital Building Trusts, Birkett v Barrow and Furness Hospital Management Committee* [1956] Ch 622, [1956] 3 All ER 164, CA. There is no general principle that, where a fund includes contributions from anonymous donors, a general charitable intention must be imputed to named subscribers; but the inclusion of anonymous contributions is a factor which may be taken into account in a doubtful case for the purpose of resolving the doubt in favour of a general charitable intention: see *Re Ulverston and District New Hospital Building Trusts, Birkett v Barrow and Furness Hospital Management Committee* supra at 632-641 and 169-175 per Jenkins LJ, and at 641-642 and 175-176 per Lord Evershed MR (explaining dicta in *Re Welsh Hospital (Netley) Fund, Thomas v A-G* [1921] 1 Ch 655 and *Re Hillier, Hillier v A-G* [1954] 2 All ER 59, [1954] 1 WLR 700, CA). See also *Re Dover's Battle of Britain Memorial Hospital Fund* (1955) Times, 29 June.
- 6 See the Charities Act 1993 s 14; and CHARITIES vol 8 (2010) PARAS 174-175. As from a day to be appointed this treatment is extended to donors who can be identified unless they have made a declaration that they wish to be consulted before their donations are applied to other purposes: see s 14A (prospectively added by the Charities Act 2006 s 17); and CHARITIES vol 8 (2010) PARA 175. At the date at which this volume states the law no such day had been appointed.
- 7 For an instance in which there was held to have been no failure see *Re Andrew's Trust, Carter v Andrew* [1905] 2 Ch 48 (where a fund was subscribed towards the education of children of the deceased person and the purpose of the fund was held not to have failed merely because the children had grown up, as 'education' was either to be construed in the broadest sense or treated merely as a motive of the gift for the children). See also *Re Johnson, Pearson v Johnson* [1938] 2 All ER 173 (where subscriptions had been raised in response to an appeal for assistance to a widow and there was held to be an absolute trust for the widow who was entitled to the whole fund).
- 8 *Re Abbot Fund Trusts, Smith v Abbot* [1900] 2 Ch 326. The fact that some subscribers are unascertainable does not prevent the court from holding that there is a resulting trust for the named donors and, if those that are unascertained can be found by inquiry, the resulting trust can be executed in their favour: *Re Gillingham Bus Disaster Fund, Bowman v Official Solicitor* [1958] Ch 300, [1958] 1 All ER 37; affd on another point [1959] Ch 62, [1958] 2 All ER 749, CA.
- 9 *Cunnack v Edwards* [1896] 2 Ch 679, CA; *Braithwaite v A-G* [1909] 1 Ch 510; *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544 (criticised in *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936 by Walton J on the basis that the surplus should pass to the members of the unincorporated association at the date of dissolution as the subscribed money should be treated as an accretion to the association's funds subject to the members' contractual rights). See also *Re GKN Bolts and Nuts Ltd Sports and Social Club, Leek v Donkersley* [1982] 2 All ER 855, sub nom *Re GKN Bolts and Nuts Ltd (Automotive Division) Birmingham Works Sports and Social Club, Leek v Donkersley* [1982] 1 WLR 774; *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, [1972] 2 All ER 439; and PARA 712 post. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.
- 10 *Re Hobourn Aero Components Ltd's Air Raid Distress Fund, Ryan v Forrest* [1946] Ch 86, [1945] 2 All ER 711 (affd on another point [1946] Ch 194, [1946] 1 All ER 501, CA); *Re Gillingham Bus Disaster Fund, Bowman v Official Solicitor* [1958] Ch 300, [1958] 1 All ER 37 (affd on another point [1959] Ch 62, [1958] 2 All ER 749, CA). The rule laid down in relation to a current account in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572 (see EQUITY vol 16(2) (Reissue) PARA 864) does not apply: *Re British Red Cross Balkan Fund, British Red Cross Society v Johnson* [1914] 2 Ch 419 at 421 per Astbury J. See also *Re Customs and Excise Officers' Mutual Guarantee Fund, Robson v A-G* [1917] 2 Ch 18 at 31. As to the bringing of benefits received by subscribers into hotchpot

see *Re Hobourn Aero Components Ltd's Air-Raid Distress Fund*, *Ryan v Forrest* supra at 97 and 718 per Cohen J. For the position with regard to clubs see PARA 712 ante.

11 *Re Gillingham Bus Disaster Fund*, *Bowman v Official Solicitor* [1958] Ch 300 at 314, [1958] 1 All ER 37 at 43; affd on another point [1959] Ch 62, [1958] 2 All ER 749, CA. As to payment into court by trustees generally see PARA 917 et seq post.

12 *Davis v Richards and Wallington Industries Ltd* [1991] 2 All ER 563, [1990] 1 WLR 1511 (where it was held that, in so far as the surplus was derived from the employers' overpayments, there was a resulting trust for them; but there was no resulting trust in relation to the employees' contributions because it would lead to an unworkable result and it would conflict with the statutory provisions giving tax advantages to an approved scheme; to that extent the surplus devolved as bona vacantia). The Privy Council has taken a different approach holding that members' share of the surplus should be divided pro rata among the members and the estates of deceased members in proportion to the contributions made by each member without regard to the benefits each has received and irrespective of the dates on which the contributions were made: see *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1414, PC.

13 See *Re Courage Group's Pension Schemes*, *Ryan v Imperial Brewing and Leisure* [1987] 1 All ER 528 at 537-538, [1987] 1 WLR 495 at 505-506 per Millett J. See also *National Grid plc v Mayes* [2000] ICR 174, CA (overruled on other grounds at [2001] UKHL 20, [2001] 2 All ER 417, [2001] WLR 864). On the correct approach to amendments to pension schemes see *Re Courage Group's Pension Schemes*, *Ryan v Imperial Brewing and Leisure* supra; *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association* [2003] UKPC 58, [2003] OPLR 281.

14 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 537, [1990] 1 WLR 1587 at 1610 per Warner J.

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### **709. Rights of residuary or other devisee or legatee on failure of will trust.**

The terms of a testamentary disposition may be such that, where a trust fails or is not exhausted in carrying out the designated object, the beneficial interest under the trust, or the unexhausted part of it, is caught by a residuary devise or residuary bequest, as the case may be, instead of devolving as on an intestacy<sup>1</sup>.

<sup>1</sup> *Mallabar v Mallabar* (1735) Cas temp Talb 78; *Durour v Motteux* (1749) 1 Ves Sen 320; *Gravenor v Hallum* (1767) Amb 643 at 645 per Lord Camden LC; *Wright v Row* (1779) 1 Bro CC 61; *Cambridge v Rous* (1802) 8 Ves 12; *Ellis v Selby* (1836) 1 My & Cr 286; *Re Sanderson's Trust* (1857) 3 K & J 497; *Holmes v Prescott* (1864) 10 Jur NS 507; *Re Eddels' Trusts* (1871) LR 11 Eq 559; *Re West, George v Grose* [1900] 1 Ch 84; *Re Rogerson, Bird v Lee* [1901] 1 Ch 715; *Re Cartwright, Homer v Halley* (1911) Times, 4 February.



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### **710. The Crown's right on intestacy.**

Where a person dies intestate after 31 December 1925 leaving no person entitled to share in his estate under the provisions relating to distribution on intestacy, his residuary estate belongs to the Crown as bona vacantia in default of any other person taking an absolute interest in it<sup>1</sup>. In the case of a partial intestacy, an executor can defeat the claim of the Crown only if it appears by the will that he is to take beneficially<sup>2</sup>.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 170 et seq. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 618.

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### **C. FAILURE OF PARTICULAR PURPOSE; DISSOLUTION OF SOCIETIES AND ASSOCIATIONS**

#### **711. Failure of purpose.**

Where property is purchased in the name, or is transferred into the possession, of a person to effect or assist a purpose which is never carried out, there is a resulting trust of it for the purchaser or transferor, and he can make good his claim to it<sup>1</sup>. Even if a transfer was made for the fraudulent purpose of evading the law, the transferor is entitled to have the property reconveyed or restored unless he is forced to plead or rely on the illegality<sup>2</sup>.

Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses and save to the extent to which he may have taken security for repayment, the lender takes the risk of the borrower's insolvency<sup>3</sup>. However, where money is advanced to a borrower for a stated purpose and the borrower accepts it on terms that the money will be used exclusively for that purpose, the money is impressed with a trust for that purpose, a so-called 'Quistclose trust'<sup>4</sup>. The recipient acquires no beneficial interest in the money, at least while the designated purpose is still capable of being carried out<sup>5</sup>. If the designated purpose fails (for example, because the recipient goes into liquidation), the money will not form part of the borrower's general funds but will be held for the lender.

Keeping the money in a separate account is clear evidence that it is intended for a special purpose but it is not essential<sup>6</sup>.

The exact nature of the Quistclose trust has been a matter of academic controversy but it has been described as 'an entirely orthodox example of the kind of default trust known as a resulting trust'<sup>7</sup>.

There may be circumstances where the intended payee under a Quistclose trust obtains a beneficial interest in the fund<sup>8</sup>.

1 *Ward v Lant* (1701) Prec Ch 182; *Birch v Blagrave* (1755) Amb 264; *Platamone v Staple* (1815) Coop G 250; *Cecil v Butcher* (1821) 2 Jac & W 565 at 573 per Plumer MR; *Childers v Childers* (1857) 1 De G & J 482, CA; *Barclays Bank Ltd v Rolls Razor Ltd* [1970] AC 567, sub nom *Barclays Bank v Quistclose Investments Ltd* [1968] 3 All ER 651, HL; *Nest Oy v Lloyds Bank plc*, *The Tiiskeri, Nestegas and Enskeri* [1983] 2 Lloyd's Rep 658; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA; *Re E Dibbens & Sons Ltd (in liquidation)* [1990] BCLC 577; *Stanlake Holdings Ltd v Tropical Capital Investment Ltd* (1991) Financial Times, 25 June, CA; *Lord Napier and Ettrick and Richards Butler v RF Kershaw Ltd* [1993] 1 Lloyd's Rep 10, CA (revsd in part without discussion of this point [1993] AC 713, [1993] 1 All ER 385, HL); *R v Common Professional Examination Board, ex p Mealing-McCleod* (2000) Times, 2 May, [2000] All ER (D) 588, CA.

2 See *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; and PARA 682 ante. See also CONTRACT vol 9(1) (Reissue) PARA 839 et seq. As to the effect of putting property into the name of another generally see PARA 713 et seq post.

3 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL.

4 *Barclays Bank Ltd v Rolls Razor Ltd*[1970] AC 567, sub nom *Barclays Bank v Quistclose Investments Ltd*[1968] 3 All ER 651, HL. See also *Carreras Rothman Ltd v Freeman Matthews Treasure Ltd*[1985] Ch 207, [1985] 1 All ER 155 (where there was an antecedent debt). The transaction need not be by way of loan. See also *Templeton Insurance Ltd v Penningtons Solicitors LLP*[2006] EWHC 685 (Ch), [2006] All ER (D) 191 (Feb), where the obligation arose from an undertaking that money paid into client account would be held for the client and used for a particular purpose.

5 *Twinsectra v Yardley*[2002] UKHL 12 at [68]-[69], [2002] 2 AC 164 at [68]-[69], [2002] 2 All ER 377 at [68]-[69] per Lord Millett.

6 In *Barclays Bank Ltd v Rolls Razor Ltd*[1970] AC 567, sub nom *Barclays Bank v Quistclose Investments Ltd*[1968] 3 All ER 651, HL, and in *Carreras Rothman Ltd v Freeman Matthews Treasure Ltd*[1985] Ch 207, [1985] 1 All ER 155, the money was held in a separate account; but in *Twinsectra v Yardley*[2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377 and in *Re EVTR, Gilbert v Barber*[1987] BCLC 646, CA, it was not. The failure to use a separate account was regarded as significant in *Neste Oy v Lloyds Bank plc, The Tiiskeri, Nestegas and Ensleri*[1983] 2 Lloyd's Rep 658, sub nom *Neste Oy v Lloyds Bank plc*[1983] Com LR 185, 133 NLJ 597. See further *Re Farpak Foods and Gifts Ltd*[2006] EWHC 3272.

7 *Twinsectra v Yardley*[2002] UKHL 12 at [100], [2002] 2 AC 164 at [100], [2002] 2 All ER 377 at [100] per Lord Millett (although it is not entirely clear whether the other Law Lords agreed with him). But see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 708, [1996] 2 All ER 961 at 990-991 per Lord Browne-Wilkinson. See also Chambers *Resulting Trusts* (1st Edn, 1997) p 68 et seq; and Ho and Smart 'Reinterpreting the Quistclose Trust: A Critique of Chambers' Analysis' (2001) 21 Oxford Journal of Legal Studies pp 267-285.

8 In *Carreras Rothman Ltd v Freeman Mathews Treasure Ltd*[1985] Ch 207 at 223, [1985] 1 All ER 155 at 166, Peter Gibson J (citing *Re Northern Developments (Holdings) Ltd* (6 October 1978, unreported) said that he did not accept that the payees had no enforceable rights. See the discussion by Millett QC 'The Quistclose Trust: who can enforce it?' (1985) 101 LQR 269 at 202-203. See also *Re Margaretta Ltd, Freeman v Customs and Excise Comrs* [2005] STC 610 at 615 per Crystal QC (accepting that there may be situations where the intended payee obtains a beneficial interest in the fund). These include situations where (1) the obvious intention of the transaction would be frustrated if the donor were to retain a power of revocation of the trust (*New, Prance and Garrard's Trustee v Hunting*[1897] 2 QB 19, CA); (2) where the existence of the trust arrangements is communicated to the intended payee and the latter gains a beneficial interest in the money either because of the creation of an estoppel in his favour or because communication perfects an assignment of the donor's equitable interest to him (*Acton v Woodgate* (1833) 2 My & K 492 at 495; *Ellis & Co v Cross*[1915] 2 KB 654 at 659; *Cavendish v Browne* (1844) 7 I Eq R 369 at 388, 1 Jo & Lat 606 at 635-636; *Morrell v Wootten* (1852) 16 Beav 197 at 202-203; *Re Hamilton, FitzGeorge v FitzGeorge* (1921) 124 LT 737).

## UPDATE

### 711 Failure of purpose

NOTE 4--See also *Cooper v PRG Powerhouse*[2008] EWHC 498 (Ch), [2008] 2 All ER (Comm) 964 (transfer for purposes of payment to third party; resulting trust established).

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## **712. Surplus funds on dissolution of unincorporated associations.**

Unincorporated associations may be established as social or sports clubs or as mutual benefit societies, for example, to provide for the widows of members, out of a fund raised by subscriptions, donations, legacies and fund-raising activities. If the club or mutual benefit society ceases to be carried on, difficult questions arise as to the destination of surplus funds.

Persons who provided money as a result of fund-raising activities have no claim to the return of their money where they parted with it in pursuance of some contract (for example, by paying for tickets for dances, whist-drives, raffles or film shows) or by way of outright absolute gift (for example, by putting money in collection boxes or giving it towards a non-contractual sponsored run)<sup>1</sup>. Such money is an accretion to the association's funds subject to the members' contractual rights under the association's rules<sup>2</sup>.

Persons who provided money by way of outright absolute donation or legacy have no claim to the return of their money, as they are taken to have abandoned it; such money is an accretion to the association's funds<sup>3</sup>. If the donor or testator imposed valid trusts on his money, there will be a resulting trust for him if those trusts fail in respect of part of that money<sup>4</sup>. To be valid, the trusts must satisfy the rule against remoteness of vesting and inalienability<sup>5</sup> and not be for a non-charitable purpose<sup>6</sup>. As many purported trusts would therefore be invalid, the courts are inclined, in the absence of a clear expression of a trust, to construe the donation or legacy as an outright absolute gift of money accruing to the association's funds subject to the members' contractual rights under the association's rules<sup>7</sup>.

Money subscribed by the members themselves under the association's rules is subject to their contractual rights under the rules, and is paid by way of contract and not to establish a trust<sup>8</sup>. The money is thus the property of the members, whether the association is to provide benefits for members or only for third persons such as members' widows and children<sup>9</sup>.

On the dissolution of the association its funds, subject only to any rights of a third person under contracts or trusts entered into or created by the duly authorised procedure under the association's rules, pass to the members<sup>10</sup>. Only if the association has become moribund, as where all or all but one of the members have died, will the funds be treated as bona vacantia passing to the Crown<sup>11</sup>.

<sup>1</sup> *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.

<sup>2</sup> *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526 at 538-539, [1971] 3 All ER 401 at 407-408; *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 2 All ER 1, [1982] 1 WLR 522, CA; *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936; *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL.

<sup>3</sup> See the cases cited in note 2 supra.

<sup>4</sup> *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544.

<sup>5</sup> See PARAS 684-685 ante.

6 See PARA 607 ante.

7 See the cases cited in notes 2, 4 supra.

8 See *St Andrew's Allotment Association's Trusts, Sargeant v Probert* [1969] 1 All ER 147, [1969] 1 WLR 229; *Re William Denby & Sons Ltd Sick and Benevolent Fund, Rowling v Wilks* [1971] 2 All ER 1196, [1971] 1 WLR 973; *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544; *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, [1972] 2 All ER 439; *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936.

9 *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936 (where Walton J criticised the contrary view of Goff J in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544).

10 The authorities differ as to whether the surplus is to be divided equally between members, subject to any provision in the rules to the contrary or proportionally to the amounts contributed. The proportional approach was adopted in *Re Printers and Transferrers Amalgamated Trades Protection Society* [1899] 2 Ch 184 and *Re Lead Company's Workmen's Fund Society* [1904] 2 Ch 196, disregarding any benefits received. The proportional approach was also adopted in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund, Re Ryan v Forrest* [1946] Ch 86, [1945] 2 All ER 711 (affd on another point [1946] Ch 194, [1946] 1 All ER 501, CA), but members were required to bring into hotchpot benefits received from the fund. However, the better view appears to be that of equal distribution: *Re St Andrew's Allotment Association's Trusts, Re Sargeant v Probert* [1969] 1 All ER 147, [1969] 1 WLR 229; *Re Sick and Funeral Society of St John's Sunday School, Re Golcar* [1973] Ch 51, [1972] 2 All ER 439; *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society, Thompson v Holdsworth (No 2)* [1979] 1 All ER 623, [1979] 1 WLR 936; *Re GKN Bolts and Nuts Ltd Sports and Social Club, Leek v Donkersley* [1982] 2 All ER 855, sub nom *Re GKN Bolts and Nuts Ltd (Automotive Division) Birmingham Works Sports and Social Club, Leek v Donkersley* [1982] 1 WLR 774.

11 See note 9 supra. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) PARA 231 et seq.

## UPDATE

### 712 Surplus funds on dissolution of unincorporated associations

NOTE 9--*Bucks Constabulary*, cited, not followed in *Hanchett-Stamford v A-G* [2008] EWHC 330 (Ch), [2008] 4 All ER 323 (sole surviving member of an unincorporated association is able to claim the assets of the association).

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## **D. PROPERTY PUT INTO THE NAME OF ANOTHER**

### **713. Effect of purchase in or transfer into another's name.**

Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person<sup>1</sup> or some presumption<sup>2</sup> of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferor<sup>3</sup>. Thus there is a resulting trust where the transfer is into the joint names of the transferor and a minor to whom the transferor does not stand in loco parentis<sup>4</sup>, and the mere fact that a minor cannot since 31 December 1925 be validly appointed a trustee<sup>5</sup> does not affect the presumption.

So far as improvements are concerned, the general rule is that moneys voluntarily spent by one party on improving property beneficially owned by him and another will not increase the former's proportionate beneficial interest in the property unless the parties specifically agree or exceptionally if such an agreement may be inferred<sup>6</sup>.

Where in order to achieve an illegal purpose, property is transferred by one person into the name of another, being persons between whom the presumption of advancement does not apply, the transferor can recover the property, on the ground that he is not forced to rely on the illegality but only on the resulting trust that arose in his favour on the transfer<sup>7</sup>.

Where a sitting tenant is entitled to buy a property at a discount, the amount of the discount will be regarded as a contribution to the purchase price<sup>8</sup>.

1 *Earl of Plymouth v Hickman* (1690) 2 Vern 167; *Crop v Norton* (1740) 2 Atk 74; *Maddison v Andrew* (1747) 1 Ves Sen 57 at 61; *Rider v Kidder* (1805) 10 Ves 360; *George v Bank of England* (1819) 7 Price 646; *Currant v Jago* (1844) 1 Coll 261; *Deacon v Colquhoun* (1853) 2 Drew 21; *Wheeler v Smith* (1859) 1 Giff 300; *Garrick v Taylor* (1860) 29 Beav 79; *Beecher v Major* (1865) 2 Drew & Sm 431; *Forrest v Forrest* (1865) 11 Jur NS 317; *Tumbridge v Care* (1871) 19 WR 1047; *Marshall v Crutwell* (1875) LR 20 Eq 328 at 329; *Fowkes v Pascoe* (1875) 10 Ch App 343, CA; *Standing v Bowring* (1885) 31 ChD 282, CA; *Young v Sealey* [1949] Ch 278, [1949] 1 All ER 92 (where the facts showed an intention to benefit the other person and, even though the gifts were of a testamentary nature and not made according to the Wills Act 1837, the transferee's claim was not defeated); *Re Figgis, Roberts v MacLaren* [1969] 1 Ch 123, [1968] 1 All ER 999. The resulting trust may be rebutted as to part of the property or part of the interest in it and remain valid as to the rest: *Benbow v Townsend* (1833) 1 My & K 506 at 510 per Leach MR.

2 As to transactions where one party is in loco parentis towards the other, or transactions between husband and wife, see PARAS 715-717 post.

3 *Anon* (1683) 2 Vent 361; *Gascoigne v Thwing* (1685) 1 Vern 366; *Ambrose v Ambrose* (1716) 1 P Wms 321; *Ryall v Ryall* (1739) 1 Atk 59; *Lloyd and Jobson v Spillet* (1741) 2 Atk 148; *Withers v Withers* (1752) Amb 151; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *Finch v Finch* (1808) 15 Ves 43 at 50 per Lord Eldon LC; *Mackreth v Symmons* (1808) 15 Ves 329 at 350 per Lord Eldon LC; *Murless v Franklin* (1818) 1 Swan 13 at 17-18 per Lord Eldon LC; *Field v Lonsdale* (1850) 13 Beav 78; *Pfleger v Browne* (1860) 28 Beav 391; *Haigh v Kaye* (1872) 7 Ch App 469; *Rudkin v Dolman* (1876) 35 LT 791; *Re Policy No 6402 of the Scottish Equitable Life Assurance Society* [1902] 1 Ch 282; *Re Howes, Howes v Platt* (1905) 21 TLR 501; *The Venture* [1908] P 218, CA; *Shepherd v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269, [1974] 1 All ER 47 (revsd without affecting this point [1974] Ch 269, [1974] 3 All ER 205, CA); *Gross v French* (1975) 238 Estates Gazette 39, CA. See also *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; and GIFTS vol 52 (2009) PARA 241.

4 *Re Vinogradoff, Allen v Jackson* [1935] WN 68; *Re Muller, Cassin v Mutual Cash Order Co Ltd* [1953] NZLR 879; cf *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124 (where a child's endowment policy was taken out by a godfather on his own life for the benefit of his godchild, and no trust was established in favour of the godchild).

5 See PARA 609 ante.

6 *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA.

7 *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL (applied in *Silverwood v Silverwood* (1997) 74 P & CR 453, CA, and *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA). See PARA 682 ante. Where the presumption of advancement arises the claimant cannot lead evidence of an illegal purpose to rebut that presumption. Hence, there will be different consequences where in pursuance of an illegal purpose a man puts property into the name of his wife as compared to that of his mistress. In *Lowson v Coombes* supra Walker LJ observed at 385 and 729 that the importance attached to the presumption of advancement creates difficulties because the presumption has been cogently criticised both as out of date in modern social and economic conditions (see especially the remarks of Lord Diplock in *Pettitt v Pettitt* [1970] AC 777 at 824, [1969] 2 All ER 385 at 414) and as being uncertain in its scope (especially in relation to transfers by wives and mothers). See also *Tribe v Tribe* [1996] Ch 107 at 118, [1995] 4 All ER 236 at 244 per Nourse LJ; and PARAS 715, 717 post.

8 *Marsh v Von Sternberg* [1986] 1 FLR 526; *Ash (Trustee in Bankruptcy of Henry Samuel Mumford) v Mumford* [2000] All ER (D) 1452, CA.

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## 714. Joint transactions.

The principle that the property is deemed to be held on a resulting trust applies where several persons purchase property in the name of one<sup>1</sup>. Where, however, two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests<sup>2</sup>, and contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of the purchase or transfer or there are circumstances from which such an intention can be inferred<sup>3</sup>. If they contributed the purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenancy in common between them in equity<sup>4</sup>, although even in this case the equitable tenancy in common may be rebutted by evidence or circumstances<sup>5</sup>. In the case of a purchase in joint names by a cohabiting couple a conveyance into joint names indicates both legal and beneficial joint tenancy unless and until the contrary is proved<sup>6</sup>.

If there is a specific declaration in the conveyance as to the parties' interests, this will prevail. Thus if a conveyance of property to X and Y contains, for instance, an express declaration that the property is to be held by them as joint tenants, the fact that X may have paid all the mortgage instalments in respect of the property is not relevant in determining how the property is held and could not give rise to a resulting or constructive trust<sup>7</sup>. By taking liability under a joint mortgage, a party will make a contribution to the purchase price sufficient to raise the presumption of a resulting trust<sup>8</sup>.

1 *Wray v Steele* (1814) 2 Ves & B 388. Purchase money does not include rent. Rent, unlike purchase money, is not paid for the acquisition of a capital asset but for the use of a property during the term: *Savage v Dunningham* [1974] Ch 181, [1973] 3 All ER 429. As to purchases by a husband and wife see PARA 717 post.

2 An express declaration necessarily concludes the question of equitable ownership in the absence of fraud or mistake at the time of the transaction: *Pettitt v Pettitt* [1970] AC 777 at 813, [1969] 2 All ER 385 at 405, HL; *Leake (formerly Bruzzi) v Bruzzi* [1974] 2 All ER 1196, [1974] 1 WLR 1528, CA; *Pink v Lawrence* (1977) 36 P & CR 98, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, CA.

3 *Edwards v Fashion* (1712) Prec Ch 332 (persons entitled to a mortgage as tenants in common in equal shares who purchased the mortgaged property and had it conveyed to them as joint tenants held to be tenants in common of the property in equity); *Carter v Horne* (1728) 1 Eq Cas Abr 7; *Aveling v Knipe* (1815) 19 Ves 441; *Harris v Fergusson* (1848) 16 Sim 308; *Robinson v Preston* (1858) 4 K & J 505; *Harrison v Barton* (1860) 1 John & H 287; *Re Hughes's Trusts* (1871) 24 LT 415. Where a mortgage is taken by two or more persons in equal shares, there is a tenancy in common in equity: *Petty v Styward* (1631) 1 Rep Ch 57; *Robinson v Preston* supra at 511 per Wood V-C. See also MORTGAGE vol 77 (2010) PARA 212. Where two persons were tenants in common of land and money representing the profits of the land was paid into a joint account without any survivorship clause, it was held in Ireland that there was a tenancy in common as respects the money also: *Lowry and McLoughlin v Fitzpatrick and Lowry* (1922) 56 ILT 108. As to co-ownership of property generally see PERSONAL PROPERTY vol 35 (Reissue) PARA 1243 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 189 et seq.

4 *Robinson v Preston* (1858) 4 K & J 505 at 510; *Bull v Bull* [1955] 1 QB 234, [1955] 1 All ER 253, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Sekhon v Alissa* [1989] 2 FLR 94. See also *Passee v Passee* [1988] 1 FLR 263, CA.

5 *Harris v Fergusson* (1848) 16 Sim 308; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL.



6 *Stack v Dowden* [2007] UKHL 17 at [58], [2007] 2 All ER 929 at [58] per Baroness Hale; but see at [110] per Lord Neuberger. See further PARA 722 post.

7 *Grindal v Hooper* (2000) Times, 8 February. See also *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Goodman v Gallant* [1986] Fam 106, [1986] 1 FLR 513, CA. See further *Stack v Dowden* [2007] UKHL 17 at [49], [2007] 2 All ER 929 at [49].

8 *Carlton v Goodman* [2002] EWCA Civ 545 at [22], [2002] 2 FLR 259 at [22] per Mummery LJ, and at [38] per Ward LJ (although the presumption was rebutted on the facts).

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### **715. Advancement or gift to a child.**

Normally when property is transferred to another in a voluntary conveyance there will be evidence of the intention with which a transfer is made. Where there is not, the presumption of a resulting trust will normally apply but in some cases the presumption of advancement will apply instead. However, where there is evidence, it will be conclusive<sup>1</sup>. As with the presumption of advancement between husband and wife, the strength of the presumption has been reduced<sup>2</sup>.

Where a father<sup>3</sup> or other person in loco parentis purchases property in the name of a child or transfers property into the name of a child, the transaction does not create a resulting trust for the purchaser or transferor, but is an advancement or gift to the child<sup>4</sup>, unless there is evidence of a contrary intention at the time of the transaction<sup>5</sup> or the circumstances are such as to raise a presumption against the advancement or gift<sup>6</sup>. The rule is the same where a purchase, investment or transfer is made in the joint names of purchaser or transferor himself and a child<sup>7</sup>, or in the joint names of a child and a stranger<sup>8</sup>, or in the name of an illegitimate child towards whom the father has placed himself in loco parentis<sup>9</sup>. A mere moral obligation to provide for the other person is, however, not sufficient to rebut the resulting trust<sup>10</sup>. A party cannot rely on his own fraud or illegality to found a claim or rebut a presumption<sup>11</sup>.

1 Some of the older authorities suggest that the presumption of advancement is not lightly to be displaced by evidence. See *Finch v Finch* (1808) 15 Ves 43; *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC; *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL. These authorities have lost much of their force in modern times. See *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL, on the presumption as it applies between husband and wife. In *Lavelle v Lavelle* [2004] EWCA Civ 223 at [19], [2004] 2 FCR 418 at [19], Lord Phillips of Worth Matravers MR said that equity searches for the subjective intention of the transferor and that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. The courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a 'long-stop' or 'default' solution is needed: see *Kyriakides v Pippas* [2004] EWHC 646 (Ch) at [76], [2004] 2 FCR 434 at [76] per Moss QC, sitting as a High Court judge.

2 *McGrath v Wallis* [1995] 3 FCR 661 at 668, [1995] 2 FLR 114 at 121 per Nourse LJ (describing the equitable presumption of advancement in relation to houses acquired for joint occupation as a judicial instrument of last resort comparable to the contra proferentem rule). The court must have regard to all the circumstances of the case: *Ali v Khan* [2002] EWCA Civ 974 at [11], 5 ITELR 232 at [11] per Morritt V-C (citing *McGrath v Wallis* supra). But see *Antoni v Antoni* [2007] UKPC 10 at [20], [2007] All ER (D) 335 (Feb) at [20] where Lord Scott of Foscote referred to the 'relevance and importance of the presumption of advancement'.

3 Nowadays there is much to be said for the view that the presumption of advancement should apply to a purchase or transfer of property by a mother, even though not widowed or divorced, although, if a resulting trust were presumed, it would be capable of rebuttal by slight evidence: see *Re De Visme* (1863) 2 De GJ & Sm 17; *Down v Ellis* (1865) 35 Beav 578; *Sayre v Hughes* (1868) LR 5 Eq 376; *Bennet v Bennet* (1879) 10 ChD 474 at 479-480; *Re Orme, Evans v Maxwell* (1883) 50 LT 51; *Gross v French* (1975) 238 Estates Gazette 39, CA; *Sekhon v Alissa* [1989] 2 FLR 94. Support for this view can be gained from the decision in *Re Cameron* [1999] Ch 386, [1999] 2 All ER 924, where it was held, so far as concerned the rule against double portions, that both parents should nowadays be taken to be in loco parentis unless the contrary is proved. In *Lavelle v Lavelle* [2004] EWCA Civ 223 at [14], [2004] 2 FCR 418 at [14] Lord Phillips of Worth Matravers MR referred to the presumption arising where there is 'a close relationship' and gave the example of father and child. A mother is under a statutory duty to maintain her child: see the Social Security Administration Act 1992 ss 78(6), (7), 105 (ss 78(6), 105 as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 397.

4 *Scroope v Scroope* (1663) 1 Cas in Ch 27; *Lord Grey v Lady Grey* (1677) 2 Swan 594; *Baylis v Newton* (1687) 2 Vern 28; *Taylor v Taylor* (1737) 1 Atk 386; *Stileman v Ashdown* (1742) 2 Atk 477 at 480 per Lord Hardwicke LC; *Rumboll v Rumboll* (1761) 2 Eden 15; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *Finch v Finch* (1808) 15 Ves 43; *Dummer v Pitcher* (1833) 2 My & K 262 at 272 per Lord Brougham LC; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Re Cane's Trusts* (1867) 36 LJ Ch 744; *Hepworth v Hepworth* (1870) LR 11 Eq 10; *Stock v McAvoy* (1872) LR 15 Eq 55 at 58 per Wickens V-C; *Bennet v Bennet* (1879) 10 ChD 474; *Re Richardson, Weston v Richardson* (1882) 47 LT 514; *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL. The principle extends to a transfer into the names of a married daughter and her husband, even where the name of the transferor is joined with theirs: *Batstone v Salter* (1875) 10 Ch App 431. See also *Ebrand v Dancer* (1680) 2 Cas in Ch 26 (grandfather); *Soar v Foster* (1858) 4 K & J 152 at 157 (grandfather); *Loyd v Read* (1719) 1 P Wms 607 (grandmother); *Re Howes, Howes v Platt* (1905) 21 TLR 501 (aunt and her niece).

5 *Blake v Blake* (1721) 7 Bro Parl Cas 241, HL; *Birch v Blgrave* (1755) Amb 264; *Murless v Franklin* (1818) 1 Swan 13 at 17, 19 per Lord Eldon LC; *Pranker v Pranker* (1820) 1 Sim & St 1; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Re Collinson, Collinson v Collinson* (1853) 3 De GM & G 409; *Williams v Williams* (1863) 32 Beav 370; *Tucker v Burrow* (1865) 2 Hem & M 515; *Re Gooch, Gooch v Gooch* (1890) 62 LT 384; *Warren v Gurney* [1944] 2 All ER 472, CA; contra *Stamp Duties Comrs v Byrnes* [1911] AC 386, PC. See also *McGrath v Wallis* [1995] 3 FCR 661, [1995] 2 FLR 114, CA (evidence that a house had been put in son's name to enable a mortgage to be obtained, and the existence of proposals that the beneficial interest should be shared, held sufficient to rebut the presumption); *Ali v Khan* [2002] EWCA Civ 974, 5 ITELR 232 (evidence that it was not the father's intention to dispose of the beneficial interest admissible to rebut the presumption). The fact that the purchase could not have been taken wholly in the name of the purchaser is not sufficient to rebut the presumption: *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 98. Subsequent acts or expressions on the part of the parent will not convert the advancement or gift into a trust for himself: *Murless v Franklin* supra; *Crabb v Crabb* (1834) 1 My & K 511 at 519 per Lord Brougham LC; *Sidmouth v Sidmouth* supra; *Jeans v Cooke* (1857) 24 Beav 513 at 521. Cf *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL (where it was held that there was no link to enable subsequent events to be admissible as evidence of intention). Subsequent acts or declarations of the child may, however, establish a trust in favour of the parent: *Pole v Pole* (1748) 1 Ves Sen 76; *Sidmouth v Sidmouth* supra; *Jeans v Cooke* supra at 521. As to the position where a father effects an insurance policy on the life of his son see *Freme v Brade* (1858) 2 De G & J 582; *Worthington v Curtis* (1875) 1 ChD 419, CA; *Hadden v Bryden* (1899) 1 F 710, Ct of Sess; *A-G v Murray* [1904] 1 KB 165 at 172, CA; *Carmichael v Carmichael's Executrix* (1920) 57 SLR 547, HL (insurance by a father on the life of his child held not to be an advancement). See also GIFTS vol 52 (2009) PARA 242; INSURANCE vol 25 (2003 Reissue) PARA 558.

6 *Elliot v Elliot* (1677) 2 Cas in Ch 231; *Pole v Pole* (1748) 1 Ves Sen 76; *Pranker v Pranker* (1820) 1 Sim & St 1; *Kilpin v Kilpin, Kilpin v Lamb* (1834) 1 My & K 520; *Garrett v Wilkinson* (1848) 2 De G & Sm 244. The fact that the child is acting as the parent's solicitor raises a contrary presumption: *Garrett v Wilkinson* supra. The fact of the child having been already advanced or provided for does not, however, necessarily rebut the advancement or gift: *Kilpin v Kilpin, Kilpin v Lamb* supra at 542 per Lord Brougham LC; *Hepworth v Hepworth* (1870) LR 11 Eq 10. See also CHILDREN AND YOUNG PERSONS.

7 *Re Warwick, Warwick v Chrisp* (1912) 56 Sol Jo 253 (money on deposit in joint names of father and daughter). See also the cases cited in note 2 supra.

8 *Lamplugh v Lamplugh* (1709) 1 P Wms 111; *Crabb v Crabb* (1834) 1 My & K 511; *Kilpin v Kilpin, Kilpin v Lamb* (1834) 1 My & K 520 at 542.

9 *Beckford v Beckford* (1774) Lofft 490; *Kilpin v Kilpin, Kilpin v Lamb* (1834) 1 My & K 520 at 542; *Petty v Petty* (1853) 17 Jur 646; *Soar v Foster* (1858) 4 K & J 152 at 157 et seq per Wood V-C.

10 *Soar v Foster* (1858) 4 K & J 152 at 161 per Wood V-C.

11 *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; *Tribe v Tribe* [1996] Ch 107, [1995] 4 All ER 236, CA; *Collier v Collier* [2002] EWCA Civ 1095, 6 ITELR 270, [2002] All ER (D) 446 (Jul).

## UPDATE

### 715 Advancement or gift to a child

NOTE 1--See also *Sillett v Meek* [2007] EWHC 1169 (Ch), (2008) 10 ITELR 617.

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### **716. Addition to settlement funds.**

If a husband puts an additional fund into the names of the trustees of his marriage settlement who hold funds on trust for himself and his wife and children, it is deemed to be intended as an accretion to the settled funds and not to be held on a resulting trust for him<sup>1</sup>.

<sup>1</sup> *Re Curteis' Trusts* (1872) LR 14 Eq 217; distinguished in *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL.

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## 717. Transactions between husband and wife.

As in the case of other transfers evidence of intention will be conclusive<sup>1</sup>. However, where there is no such evidence the presumption of advancement will apply instead. If a husband purchases property in the sole name of his wife or transfers property into her sole name, he is presumed to do so as an absolute advancement or gift to her<sup>2</sup>. The presumption also applies to a purchase by an intending husband in the name of an intending wife<sup>3</sup>. The presumption applies to the opening of a joint bank account<sup>4</sup>. A purchase or transfer of property by a husband in or into the joint names of himself and his wife, or of himself and his wife and a third person, is presumed to be for the benefit of his wife if she survives him, but, if he survives her, the property reverts to him<sup>5</sup>. The strength of the presumption has been much diminished with changing conditions of society<sup>6</sup>. Where, however, a wife hands over to her husband property belonging to her, without any intention of making a gift of it to him, he will hold it on a resulting trust for her<sup>7</sup>. Both the presumption of advancement and the presumption of a resulting trust can be rebutted by evidence of a contrary intention<sup>8</sup>. A husband cannot set up his own illegality or fraud in order to rebut the presumption of advancement<sup>9</sup>.

Where a spouse makes a substantial contribution to the improvement of property subsequent to the purchase, then, unless otherwise agreed, that spouse is to be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, of such an extent as may have been then agreed or, in default of such agreement, as the court may in all the circumstances consider just<sup>10</sup>.

1 See PARA 715 note 1 ante. See also *McHardy & Sons (a firm) v Warren* [1994] 2 FLR 338, CA, where it was held that it could be inferred, where a parent had made a deposit on his child's first matrimonial home, that the bride and groom had equal interests in the home, it being irrelevant that the title was registered in the name of only one of the spouses. Similarly, in *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA, it was held that a loan to a married couple from one of their parents to finance a deposit on a house was capable of founding an inference of a common intention to share the property beneficially even if the house was conveyed into the husband's name alone.

2 *Re Eykyn's Trusts* (1877) 6 ChD 115 at 118 per Malins V-C. See also *Kingdon v Bridges* (1688) 2 Vern 67; *Rider v Kidder* (1805) 10 Ves 360 at 367 per Lord Eldon LC; *Soar v Foster* (1858) 4 K & J 152 at 158, 160; *Re Emery's Investments Trusts, Emery v Emery* [1959] Ch 410, [1959] 1 All ER 577; *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA. The principle applies where the name of a third person is added: *Re Eykyn's Trusts* supra at 119. See also *R v Harrow London Borough Council, ex p Coker* (1989) Times, 14 March, CA (an unusual case where a third party sought, albeit unsuccessfully, to rely on the presumption).

3 *Moate v Moate* [1948] 2 All ER 486.

4 *Marshall v Crutwell* (1875) LR 20 Eq 328; *Re Pattinson, Graham v Pattison* (1885) 1 TLR 216; *Re Harrison, Day v Harrison* (1920) 90 LJCh 186; *Re Figgis, Roberts v McClaren* [1969] 1 Ch 123, [1968] 1 All ER 999.

5 *Christ's Hospital v Budgin* (1712) 2 Vern 683; *Dummer v Pitcher* (1833) 2 My & K 262; *Drew v Martin* (1864) 2 Hem & M 130; *Re Eykyn's Trusts* (1877) 6 ChD 115 at 118-119; *Re Young, Trye v Sullivan* (1885) 28 ChD 705; *Morrison v M'Ferran* [1901] 1 IR 360; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL.

6 *Silver v Silver* [1958] 1 All ER 523, [1958] 1 WLR 259, CA; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL. See also *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA; *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA (where the presumption was applied). See also PARA 715 note 1 ante.

7 *Green v Carlill* (1877) 4 ChD 882; *Re Curtis, Hawes v Curtis* (1885) 52 LT 244; *Re Flamank, Wood v Cock* (1889) 40 ChD 461; *Mercier v Mercier* [1903] 2 Ch 98, CA. See also *Alexander v Barnhill* (1888) 21 LR Ir 511; *Wassell v Leggatt* [1896] 1 Ch 554; *Pearson v Pearson* (1965) Times, 30 November; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Heseltine v Heseltine* [1971] 1 All ER 952, [1971] 1 WLR 342, CA. While they are living together, the husband is not liable to account for the income of the property which he uses, with the wife's acquiescence, as he is presumed to have applied it for their joint benefit: *Re Flamank, Wood v Cock* supra. As to the equity of exoneration see *Re Pittortou (a bankrupt), ex p Trustee of the Property of the Bankrupt v Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58; *Judd v Brown* [1998] 2 FLR 360; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 649.

8 *Marshal v Crutwell* (1875) LR 20 Eq 328 (where it was held that, if a man in failing health puts money into the joint account of himself and his wife at a bank for the sake of convenience in administering their household affairs, the balance at his death forms part of his estate); *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL; *Simpson v Simpson* [1992] 1 FLR 601.

9 See *Gascoigne v Gascoigne* [1918] 1 KB 223; *McEvoy v Belfast Banking Co Ltd* [1935] AC 24, HL; *Re Emery's Investments Trusts, Emery v Emery* [1959] Ch 410, [1959] 1 All ER 577; *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC; *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA; *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL.

10 See the Matrimonial Proceedings and Property Act 1970 s 37; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 283. See also *Griffiths v Griffiths* [1973] 3 All ER 1155 at 1159, [1973] 1 WLR 1454 at 1457 (this point not discussed on appeal [1974] 1 All ER 932, [1974] 1 WLR 1350, CA); *Re Nicholson, Nicholson v Perks* [1974] 2 All ER 386, [1974] 1 WLR 476; *Samuels' Trustee v Samuels* (1973) 233 Estates Gazette 149.

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## **718. Voluntary conveyance.**

Formerly, if a conveyance of real property contained no apparent consideration and no declaration to whose use it was made, the use and with it the land conveyed resulted to the transferor<sup>1</sup>. However, the Statute of Uses (1535) was repealed by the Law of Property Act 1925<sup>2</sup>, and in a voluntary conveyance made after 31 December 1925 a resulting trust for the grantor is not to be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee<sup>3</sup>. The probable effect of this provision is that there will be no resulting trust on a voluntary conveyance unless it has been expressly conveyed upon trusts which fail to dispose of the entire equitable interest<sup>4</sup>.

1 *Beckwith's Case*, *Colgate v Blithe* (1589) 2 Co Rep 56b at 58; *Armstrong d Neve v Woolsey* (1755) 2 Wils 19. See also REAL PROPERTY vol 39(2) (Reissue) PARA 245. The contrary opinion appears to have been expressed in *Lloyd and Jobson v Spillet* (1741) 2 Atk 148 at 150; *Young v Peachy* (1742) 2 Atk 254 at 256 per Lord Hardwicke LC; *Fowkes v Pascoe* (1875) 10 Ch App 343 at 348, CA, per James LJ.

2 See the Law of Property Act 1925 s 207, Sch 7 (repealed).

3 See *ibid* s 60(3); and REAL PROPERTY vol 39(2) (Reissue) PARA 245.

4 See *Hodgson v Marks* [1971] Ch 892 at 933, [1971] 2 All ER 684 at 689, CA (where Russell LJ, giving the judgment of the court, referred to it as a 'debatable question'); *Tinsley v Milligan* [1994] 1 AC 340 at 371-372, [1993] 3 All ER 65 at 87, HL, per Lord Browne-Wilkinson.

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### **(iii) Application of Principles of Constructive and Resulting Trusts to the Matrimonial and Quasi-matrimonial Home**

#### **719. Married couples and civil partners.**

Disputes between spouses now rarely require resolution of their strict property rights under trust law as the court has wide discretionary powers in proceedings for divorce, nullity or judicial separation to distribute the property as it seems fit without having to ascertain the shares of the parties in the property<sup>1</sup>. In the rare cases where it is necessary to do so<sup>2</sup>, it is clearly established that the proper approach is through the law of trusts<sup>3</sup>.

In relation to disputes between civil partners the courts also have wide discretionary powers in proceedings for dissolution, nullity or judicial separation to distribute the property as it seems fit<sup>4</sup>.

1 See the Matrimonial Causes Act 1973 ss 23, 24 (both as amended), s 24A (as added and amended); *Fielding v Fielding*[1978] 1 All ER 267, [1977] 1 WLR 1146n, CA; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 450 et seq. As from a day to be appointed, the Matrimonial Causes Act 1973 ss 23, 24 are substituted by the Family Law Act 1996 s 15, Sch 2 paras 4, 6; however, at the date at which this volume states the law no such day had been appointed and it is unlikely that these amendments will be implemented. See MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

2 See eg *Re Cummins*[1972] Ch 62, [1971] 3 All ER 782, CA; *Lloyds Bank plc v Rosset*[1991] 1 AC 107, [1990] 1 All ER 1111, HL.

3 *Pettitt v Pettitt*[1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing*[1971] AC 886, [1970] 2 All ER 780, HL; *Lloyds Bank plc v Rosset*[1991] 1 AC 107, [1991] 1 All ER 1111, HL.

4 See the Civil Partnership Act 2004 ss 65-72, Sch 5; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.



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## 720. Unmarried couples.

The legal principles to be applied to unmarried couples when assessing the proportions in which a beneficial interest in property should be divided are the same as those developed by the courts in relation to disputes between married couples<sup>1</sup> in the absence of a valid express declaration of trust<sup>2</sup>. The absence of the commitment of marriage may, however, mean that the court will not make the same assumptions and draw the same inferences from the behaviour of an unmarried couple as in the case of a married couple<sup>3</sup>. Only if the court is satisfied that the relationship was intended to involve the same degree of commitment as marriage is it legitimate to regard the couple as no different from a married couple, for example if they have children by each other and intend to marry when free so to do<sup>4</sup>. In the case of engaged couples where the agreement to marry is terminated, any rule of law relating to the rights of husbands and wives in relation to property in which either or both has or have a beneficial interest applies<sup>5</sup>.

1 *Cooke v Head* [1972] 2 All ER 38, [1972] 1 WLR 518, CA; *Richards v Dove* [1974] 1 All ER 888; *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338, CA; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA. See also *Bristol and West Building Society v Henning* [1985] 2 All ER 606, [1985] 1 WLR 778, CA; *Equity and Law Home Loans Ltd v Prestidge* [1992] 1 All ER 909, [1992] 1 WLR 137, CA. Cf *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, [2000] 1 FCR 21, HL.

2 An express declaration is conclusive in the absence of fraud or mistake: *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, CA; *Re Gorman (a bankrupt), ex p the trustee of the bankrupt v the bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616. See also *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Pink v Lawrence* (1977) 36 P & CR 98, CA; *Turton v Turton* [1988] Ch 542, [1987] 2 All ER 641, CA; *Stack v Dowden* [2007] UKHL 17, [2007] 2 All ER 929; *Murphy v Gooch* [2007] EWCA Civ 603, [2007] All ER (D) 350 (Jun).

3 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection: *Stack v Dowden* [2007] UKHL 17 at [69], [2007] 2 All ER 929 at [69] per Baroness Hale.

4 *Eves v Eves* [1975] 3 All ER 768 at 771, [1975] 1 WLR 1338 at 1341, CA, per Lord Denning MR.

5 See the Law Reform (Miscellaneous Provisions) Act 1970 s 2; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 230. Reliance on this provision appears to be of little assistance as no special rules of trust law (except the presumption of advancement which itself is of little significance where evidence of intention is available) apply to husband and wife. The provision does not appear to empower the court to use the powers of the Matrimonial Causes Act 1973 to adjust the rights of property of engaged couples. This point was left open in *Bernard v Josephs* [1982] Ch 391 at 403, [1982] 3 All ER 162 at 169, CA, per Griffiths LJ; but in *Mossop v Mossop* [1989] Fam 77, [1988] 2 All ER 202, CA, the court held that the right to a transfer of property order under the Matrimonial Causes Act 1973 s 24 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq) requires and is conditional on there having been a decree of divorce, a decree of nullity of marriage or a decree of judicial separation. See also *Shaw v Fitzgerald* [1992] 1 FLR 357.

### UPDATE

## 720 Unmarried couples

NOTE 2--*Murphy*, cited, reported at [2007] 3 FCR 96. See also *Fowler v Barron* [2008] EWCA Civ 377, [2008] 2 FLR 831, [2008] All ER (D) 318 (Apr).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(3) CONSTRUCTIVE AND RESULTING TRUSTS/(iii) Application of Principles of Constructive and Resulting Trusts to the Matrimonial and Quasi-matrimonial Home/721. Importance of distinguishing constructive and resulting trusts.

## 721. Importance of distinguishing constructive and resulting trusts.

If there is an express declaration of trust, it will be conclusive in the absence of fraud or mistake<sup>1</sup>. In the past cases commonly failed to distinguish between resulting, implied and constructive trusts<sup>2</sup>. However, there are reasons for distinguishing between the resulting trust<sup>3</sup> and the constructive trust<sup>4</sup>. A resulting trust of a property purchased in the name of another, in the absence of contrary intention, arises once and for all at the date on which the property is acquired. Payments of mortgage instalments are not payments of the purchase price already paid to the vendor but are sums paid for discharging the mortgagor's obligations under the mortgage<sup>5</sup>. A complicating factor is the increasing use of proprietary estoppel principles in relation to constructive trusts<sup>6</sup>.

1 See the cases in PARA 720 note 2 ante.

2 See eg *Gissing v Gissing* [1971] AC 886 at 905, [1970] 2 All ER at 790, HL, per Lord Diplock.

3 In a case of a resulting trust the property will be held on trust to give effect to the parties respective contributions to its purchase price: *Walker v Hall* [1984] FLR 126, [1984] Fam Law 21, CA; *Springette v Defoe* [1992] 2 FCR 561, [1992] 2 FLR 388, CA; *Huntingford v Hobbs* [1993] 1 FCR 45, [1993] FLR 736, CA; *Midland Bank v Cooke* [1995] 4 All ER 562, [1996] 1 FCR 442, CA; *Lowson v Coombes* [1999] Ch 373, [1999] 2 WLR 720, CA. A constructive trust will be void against a trustee in bankruptcy if not made for valuable consideration whereas a resulting trust will not be: *Re Densham (a bankrupt), ex p the trustee of the bankrupt v Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519.

4 In a case of a constructive trust the property will be held on trust to give effect to the agreement reached between the parties. A party may have a share greater than his respective contribution: *Drake v Whipp* [1996] 2 FCR 296 at 301-302, [1996] 1 FLR 826 at 830-831, CA, per Peter Gibson LJ. See also *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338, CA; *Grant v Edwards* [1986] Ch 638 at 646-648, [1986] 2 All ER 426 at 431, CA, per Nourse LJ; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL.

5 *Curley v Parkes* [2004] EWCA Civ 1515, [2004] All ER (D) 344 (Oct). However, such payments could be relevant to a claim for a constructive trust.

6 See the cases listed in PARA 690 note 8 ante. See also the description by Carnwath LJ in *Stack v Dowden* [2005] EWCA Civ 857 at [75], [2006] 1 P & CR 244 at [75], [2005] 2 FCR 739 at [75] of the whole area as a 'witch's brew, into which various esoteric ingredients have been stirred over the years and in which different ideas bubble to the surface at different times'. See also *Harris v Kent* [2007] EWHC 463 (Ch), [2007] All ER (D) 238 (Mar).

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## **722. House purchased in joint names by cohabiting couple.**

Where property is purchased in joint names by a cohabiting couple, without any express declaration as to their beneficial interests<sup>1</sup>, a conveyance into joint names indicates both a legal and beneficial joint tenancy<sup>2</sup>, unless and until the contrary is proved<sup>3</sup>.

Unequal financial contributions will not necessarily give rise to unequal beneficial entitlement under the strict application of the principles of resulting trusts<sup>4</sup>. The court will ascertain the parties' shared intentions<sup>5</sup> and in cases where there is no evidence of agreement as to the amount of the shares the court will survey the whole course of dealing between the parties taking into account all conduct which throws light on the question of what shares were intended<sup>6</sup>. Prima facie, if the purchase is financed in whole or in part on mortgage, the person who assumes liability for the mortgage payments, as between the joint owners, is to be treated as having contributed the mortgage money<sup>7</sup>. Where a sitting tenant is entitled to buy a property at a discount, the amount of the discount will be regarded as a contribution to the purchase price<sup>8</sup>.

<sup>1</sup> Any express declaration would be conclusive in the absence of fraud or mistake: see the cases cited in PARA 720 note 2 ante.

<sup>2</sup> *Stack v Dowden* [2007] UKHL 17 at [56] and [58], [2007] 2 All ER 929 at [56] and [58] per Baroness Hale.

<sup>3</sup> The burden is on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way, so in the case of joint legal ownership the burden is on the owner claiming to have other than a joint beneficial interest: *Stack v Dowden* [2007] UKHL 17 at [56] and [58], [2007] 2 All ER 929 at [56] and [58] per Baroness Hale.

<sup>4</sup> *Stack v Dowden* [2007] UKHL 17 at [60], [2007] 2 All ER 929 at [60] per Baroness Hale. To the extent that *Walker v Hall* [1984] FLR 126, [1984] Fam Law 21, *Springett v Defoe* [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736 suggested otherwise, they should not be followed: *Stack v Dowden* supra at [60] per Baroness Hale (but cf Lord Neuberger's dissenting judgment at [123], saying that where there are unequal contributions there is a presumption of a resulting trust).

<sup>5</sup> See PARA 690 ante; *Gissing v Gissing* [1971] AC 886 at 905, [1970] 2 All ER 780 at 790, HL, per Lord Diplock; *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132, [1990] 1 All ER 1111 at 1118, HL, per Lord Bridge of Harwich. See also *Murphy v Gooch* [2007] EWCA Civ 603, [2007] All ER (D) 350 (Jun).

<sup>6</sup> *Stack v Dowden* [2007] UKHL 17 at [61], [2007] 2 All ER 929 at [61] per Baroness Hale; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [2004] 3 All ER 703. See also PARA 690 note 8 ante.

<sup>7</sup> *Re Gorman (a bankrupt), ex p the trustee of the bankrupt v the bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616; *Huntingford v Hobbs* [1993] 1 FCR 45, [1993] 1 FLR 736, CA.

<sup>8</sup> *Goodman v Carlton* [2002] EWCA Civ 545 at [20], [2002] 2 FLR 259 at [20], [2002] All ER (D) 284 (Apr) at [20] per Mummery LJ.

### **UPDATE**

## **722 House purchased in joint names by cohabiting couple**

NOTE 5--*Murphy*, cited, reported at [2007] 3 FCR 96. See also *Elithorn v Poulter* [2008] EWCA Civ 1364, [2009] 1 P & CR 435, [2009] All ER (D) 22 (Jan).

NOTE 6--See also *Jones v Kernott* [2009] EWHC 1713 (Ch), [2010] 1 P & CR D9, [2009] All ER (D) 123 (Jul).

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### **723. House purchased by cohabiting couple in only one name.**

Subject to any express declaration of trust<sup>1</sup>, where property is purchased in one party's name, there will also be sole beneficial ownership<sup>2</sup> unless and until the contrary is proved<sup>3</sup>. A contribution to the purchase price by the non-owning party will not necessarily give a beneficial interest proportionate to the contribution under the strict application of the principles of resulting trusts<sup>4</sup>. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially<sup>5</sup>. This common intention, which has been said to mean a shared intention communicated between them<sup>6</sup> and which must relate to the beneficial ownership of the property<sup>7</sup> can only be based on evidence of express discussions between the parties, however imperfectly remembered and however imprecise their terms may have been<sup>8</sup>. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel<sup>9</sup>.

It may be, however, that there is no evidence to support a finding of an agreement or arrangement to share the beneficial interest, however reasonable it might have been for the parties to make such an agreement if they had applied their minds to the question. Here the court, relying entirely on the conduct of the parties, may first infer from it a common intention to share the property beneficially. If the inference can properly be drawn, the same conduct may be relied upon to show that the party has acted to his or her detriment or has significantly altered his or her position in reliance on the inferred agreement. While direct contributions to the purchase price by a party who is not the legal owner, whether initially or by payment of mortgage instalments, would readily justify the court in drawing the inference of a common intention, it has been said to be very doubtful whether anything less would do<sup>10</sup>. If the conduct does not justify the court in drawing the necessary inference, the court cannot impute to the parties a common intention which they did not have by forming its own opinion as to what reasonable persons in the position of the parties would have intended.

Even if a common intention is established, a claimant will not succeed unless he or she establishes that he or she has acted to his or her detriment on the basis of that common intention<sup>11</sup>. The fact that one partner gratuitously cooks and cleans and looks after any children does not alone entitle him or her to any share in the house<sup>12</sup>.

So far as the quantum of the claimant's beneficial interest is concerned, which also depends on the common intention of the parties, either express or, more usually, to be inferred from all the circumstances<sup>13</sup>, the court can take into account both direct and indirect contributions<sup>14</sup>. Where there is evidence from which to infer a common intention that each should have a beneficial interest in the property but there is no evidence of any discussion between them of the amount of the share each is to have, the court will determine what is fair having regard to the whole course of dealing between them in relation to the property<sup>15</sup>. The value of the respective shares will be determined when the property is sold or where one party buys out the other<sup>16</sup>.

1 Any express declaration would be conclusive in the absence of fraud or mistake: see the cases cited at para 720 note 2 ante.

2 *Stack v Dowden* [2007] UKHL 17 at [56] and [58], [2007] 2 All ER 929 at [56] and [58] per Baroness Hale.

3 The burden is on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way, so in sole ownership cases it is upon the non-owner to show that he has any interest at all: *Stack v Dowden* [2007] UKHL 17 at [56], [2007] 2 All ER 929 at [56] per Baroness Hale.

4 *Stack v Dowden* [2007] UKHL 17 at [60], [2007] 2 All ER 929 at [60] per Baroness Hale; but cf Lord Neuberger's dissenting judgment at [123] that where there are unequal contributions there is a presumption of a resulting trust.

5 *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL (citing the leading cases of *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL). Expenditure on improvements to the property does not confer any beneficial interest in the absence of a common intention to that effect: *Pettitt v Pettitt* supra; *Thomas v Fuller-Brown* [1988] 1 FLR 237, CA; *Harwood v Harwood* [1992] 1 FCR 1, [1991] 2 FLR 274, CA. But see *Oxley v Hiscock* [2004] EWCA Civ 546 at [69], [2005] Fam 211 at [69], [2004] 3 All ER 703 at [69]; *Stack v Dowden* [2007] UKHL 17 at [36], [2007] 2 All ER 929 at [36] per Lord Walker.

6 *Springette v Defoe* [1992] 2 FCR 561 at 567, [1992] 2 FLR 388 at 393, CA, per Dillon LJ. A common intention by laymen to own their home jointly will be taken to mean an intention to own it equally: *Savill v Goodall* [1993] 1 FLR 755, CA.

7 In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 130, [1990] 1 All ER 1111 at 1117, HL, Lord Bridge of Harwich observed that neither a common intention by spouses that a house is to be renovated as a joint venture nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to its beneficial ownership. See also *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114, [1986] 1 WLR 1512, HL.

8 See *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL; *Hammond v Mitchell* [1992] 2 All ER 109, [1991] 1 WLR 1127. See also *Ungurian v Lesnoff* [1990] Ch 206, [1989] 3 WLR 840.

9 *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL, distinguished in *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, [1996] 2 FLR 600, CA; *Hammond v Mitchell* [1992] 2 All ER 109, [1991] 1 WLR 1127.

10 *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 133, [1990] 1 All ER 1111 at 1119, HL, per Lord Bridge of Harwich. However, in *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA, and *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA, it seems to have been thought that indirect contributions would suffice provided that they are referable to the acquisition of the property. The need for referability was repeated in *Windeler v Whitehall* [1990] 2 FLR 505. But Lord Walker suggested that referability gave rise to problems and, given that the process of buying a house with a mortgage is a continuing process, the court should take a wide view of what is capable of counting as a contribution: *Stack v Dowden* [2007] UKHL 17 at [34], [2007] 2 All ER 929 at [34].

11 *Midland Bank plc v Dobson and Dobson* [1986] 1 FLR 171, CA; *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426, CA; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL.

12 *Kowalczyk v Kowalczyk* [1973] 2 All ER 1042, [1973] 1 WLR 930, CA; *Burns v Burns* [1984] Ch 317, [1984] 1 All ER 244, CA; *Thomas v Fuller-Brown* [1988] 1 FLR 237, CA; *Howard v Jones* [1989] Fam Law 231, CA.

13 *Stokes v Anderson* [1991] 1 FLR 391 at 399, [1991] FCR 539 at 543, CA, per Nourse LJ.

14 See *Marsh v von Sternberg* [1986] 1 FLR 526 (discount to sitting tenant); *Risch v McFee* (1990) 61 P & CR 42, CA (interest-free loan); *Springett v Defoe* (1992) 65 P & CR 1, [1992] 2 FLR 388, CA (discount under the right to buy); *Drake v Whipp* [1996] 2 FCR 296, [1996] 1 FLR 826, CA (where a constructive trust exists, a broad brush approach can be adopted by a court in order to determine the parties respective beneficial interests in a house).

The shares should normally be ascertained as at the date of separation: *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA, per Denning MR and Kerr LJ (but see the different view of Griffiths LJ). All the members of the court agreed, however, that acts and events up to at least the date of separation were circumstances from which the common intention could be inferred.

See also *Gissing v Gissing* [1971] AC 886 at 909, [1970] 2 All ER 780 at 793, HL, per Lord Diplock, cited by Fox LJ in *Burns v Burns* [1984] Ch 317 at 327, [1984] 1 All ER 244 at 251, CA, and by Nourse LJ in *Stokes v Anderson* [1991] 1 FLR 391 at 399, CA; *Passee v Passee* [1988] 1 FLR 263, CA.

15 *Oxley v Hiscock* [2004] EWCA Civ 546 at [69], [2005] Fam 211 at [69], [2004] 3 All ER 703 at [69] per Chadwick LJ. See PARA 690 note 8 ante.

16 *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Gordon v Douce* [1983] 2 All ER 228, [1983] 1 WLR 563, CA; *Walker v Hall* [1984] FLR 126, [1984] Fam Law 21, CA; *Turton v Turton* [1988] Ch 542, [1987] 2 All ER 641, CA (disapproving *Hall v Hall* (1981) 3 FLR 379, CA). As to the equitable accounting that must take place before the money is distributed see *Shinh v Shinh* [1977] 1 All ER 97; *Suttill v Graham* [1977] 3 All ER 1117, [1977] 1 WLR 819, CA; *Bernard v Josephs* supra; *Re Gorman (a bankrupt), ex p the trustee of the bankrupt v the bankrupt* [1990] 1 All ER 717, [1990] 1 WLR 616, DC; *Re Pavlou (a bankrupt)* [1993] 3 All ER 955, [1993] 1 WLR 1046.

## UPDATE

### 723 House purchased by cohabiting couple in only one name

NOTES 2-5--*Stack*, cited, applied: *Murphy v Gooch* [2007] EWCA Civ 603, [2007] 3 FCR 96.

NOTES 5, 15--See also *Ledger-Beadell v Peach* [2006] EWHC 2940 (Ch), [2008] 1 FCR 146; and *The Up Yaws* [2007] EWHC 210 (Admlty), [2007] 3 FCR 515.

NOTE 5--See *Slater v Simm* [2007] EWHC 951 (Ch), [2007] WTLR 1043 (intentions of parties assessed at time of acquisition and not in light of subsequent conduct).



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## **(4) THE TRUST ESTATE**

### **(i) Title of the Trustee**

#### ***A. EXTENT OF THE ESTATE TAKEN BY THE TRUSTEE IN LAND***

#### **724. Estate in land.**

Before 1 January 1926, questions of considerable difficulty not infrequently arose as to the legal estate taken by a trustee in freehold property which was subjected to a trust. Such questions can, however, no longer arise, as the only legal estates capable of existing in land and capable of being conveyed to or vested in trustees are an estate in fee simple absolute in possession and a term of years absolute<sup>1</sup>. Under the 1925 property legislation, the title was normally vested, in the case of a settlement by way of trust for sale, in the trustees for sale<sup>2</sup> and, in the case of a settlement under the Settled Land Act 1925, in the tenant for life or statutory owner as an express trustee<sup>3</sup>.

Since 1 January 1997<sup>4</sup> it has not been possible to create a new settlement under the Settled Land Act 1925<sup>5</sup> and settlements under that Act and settlements by way of trust for sale have been replaced by trusts of land<sup>6</sup>, under which the legal estate is vested in trustees of land<sup>7</sup>.

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 45; SETTLEMENTS vol 42 (Reissue) PARA 609.

2 See SETTLEMENTS vol 42 (Reissue) PARA 609.

3 See SETTLEMENTS vol 42 (Reissue) PARAS 609, 775 et seq. For transitional provisions relating to land which was held on trust for sale or was settled land on 1 January 1926 see the Law of Property Act 1925 s 39, Sch 1 (both as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 49 et seq. Where on 1 January 1997 any land was held on trust for sale, or on the statutory trusts, by virtue of Sch 1 (as amended) (transitional provisions), it is to be held, after that date, in trust for the persons interested in the land; and references in Sch 1 (as amended) to trusts for sale or trustees for sale or to the statutory trusts are to be construed accordingly: Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 7. See also PARA 605 note 5 ante.

4 Ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 came into force.

5 See *ibid* s 2(1); para 601 note 6 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARAS 606, 675 et seq. There is a limited exception related to existing settlements: see s 2(2); and SETTLEMENTS vol 42 (Reissue) PARA 676.

6 For the meaning of 'trust of land' see PARA 605 note 5 ante.

7 See SETTLEMENTS vol 42 (Reissue) PARA 676. See also REAL PROPERTY. 'Trustees of land' means trustees of a trust of land: Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(b).

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### **725. Right to call for legal estate.**

Where the owner of an absolute equitable interest in land vests it in trustees, they have a right to call for the legal estate from the bare trustee<sup>1</sup>.

<sup>1</sup> *Angier v Stannard* (1834) 3 My & K 566; *Poole v Pass* (1839) 1 Beav 600. For the meaning of 'bare trustee' see PARA 755 post.

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## **B. CHARACTER IN WHICH PROPERTY IS TAKEN**

### **726. Presumption that no beneficial interest is taken.**

Where property is given to a person upon trust, there is a presumption that the property is given to him entirely as a trustee and not to any extent beneficially<sup>1</sup>. Where, however, the trust does not exhaust the whole beneficial interest in the property, this presumption can be rebutted by an indication in the instrument of disposition that he is intended to take the residue of it for his own benefit<sup>2</sup>.

A gift of property by will to a person upon trust to carry out certain purposes creates a resulting trust of so much as is not required for the fulfilment of those purposes<sup>3</sup>; but if a gift is to be construed as a gift to a person subject to the carrying out of certain purposes, described in the will as trusts or charges, he takes the property beneficially after the purposes have been fulfilled<sup>4</sup>.

A gift to a person for a trust or purpose which he is left at liberty either to perform or not at his option is a beneficial gift to him<sup>5</sup>. The trust or purpose in that case is the motive for the gift rather than the specific object for which it is given<sup>6</sup>.

1 *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 251 per Henley, Lord Keeper; *Middleton v Spicer* (1783) 1 Bro CC 201 at 205 per Lord Thurlow LC; *Southouse v Bate* (1814) 2 Ves & B 396; *Clarke v Hilton* (1866) LR 2 Eq 810 at 815 per Stuart V-C; *Wainford v Hey* (1875) LR 20 Eq 321; *Re West, George v Grose* [1900] 1 Ch 84 at 87 per Kekewich J. This applies in particular to a trustee taking by representation: see *Re Booth, Hattersley v Cowgill* (1917) 86 LJ Ch 270 (where *Re Howell, Re Buckingham, Liggins v Buckingham* [1915] 1 Ch 241, CA, was distinguished). See also *Re Chapman, Hales v A-G* [1922] 2 Ch 479, CA; *Re Pugh's Will Trusts, Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262.

2 *North v Crompton* (1671) 1 Cas in Ch 196; *Rogers v Rogers* (1733) 3 P Wms 193; *Hill v Bishop of London* (1738) 1 Atk 618; *Walton v Walton* (1807) 14 Ves 318 at 322; *Hughes v Evans* (1843) 13 Sim 496; *Russell v Clowes* (1846) 2 Coll 648; *Williams v Roberts* (1857) 4 Jur NS 18; *Williams v Arkle* (1875) LR 7 HL 606; *Croome v Croome* (1888) 59 LT 582, CA (affd (1889) 61 LT 814, HL); *A-G v Jefferys* [1908] AC 411, HL; cf *Re Foord, Foord v Conder* [1922] 2 Ch 519. Extrinsic evidence is not admissible to show that a person taking as trustee on the face of a will is intended to take the surplus beneficially (*Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA), although the position may be otherwise for inter vivos trusts (see *Re Tyler's Fund Trusts, Graves v King* [1967] 3 All ER 389 at 392, [1967] 1 WLR 1269 at 1275).

3 *Southouse v Bate* (1814) 2 Ves & B 396; *Barrs v Fewkes* (1864) 2 Hem & M 60; *Wainford v Hey* (1875) LR 20 Eq 321; *Re West, George v Grose* [1900] 1 Ch 84.

4 *Coningham v Mellish* (1691) Prec Ch 31; *Dowager Duchess of Beaufort v Dowager Lady Granville* (1710) 3 Bro Parl Cas 37; *Docksey v Docksey* (1710) 3 Bro Parl Cas 39; *Dawson v Clarke* (1811) 18 Ves 247; *King v Denison* (1813) 1 Ves & B 260; *Barrs v Fewkes* (1864) 2 Hem & M 60 at 65-66; *Clarke v Hilton* (1866) LR 2 Eq 810; *Croome v Croome* (1888) 59 LT 582, CA (affd (1889) 61 LT 814, HL); *Re Foord, Foord v Conder* [1922] 2 Ch 519; *Re Rees, Williams v Hopkins* [1950] Ch 204, [1949] 2 All ER 1003, CA. For the rule that a personal representative prima facie holds undisposed of estate on trust for the persons entitled on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 583 et seq. Where a testator gives specific portions of his personal property to his executors upon trust, and elsewhere in the will calls them trustees, he does not thereby constitute them trustees of the rest of his personal property: *Batteley v Windle* (1786) 2 Bro CC 31; *Pratt v Sladden* (1807) 14 Ves 192. A gift of property to persons named as executors and trustees, to be disposed of to such person or persons and in such manner and proportions as they think proper, has been held an absolute beneficial gift to them (*Gibbs v Rumsey* (1813) 2 Ves & B 294), but the contrary has been held where the terms of the will were very slightly different (*Buckle v Bristow* (1864) 10 Jur NS 1095; *Yeap Cheah Neo v Ong Cheng*

*Neo*(1875) LR 6 PC 381; *Re Pugh's Will Trusts, Marten v Pugh*[1967] 3 All ER 337, [1967] 1 WLR 1262). Where property is devised or bequeathed to a trustee upon certain trusts subject to the payment of legacies or other charges, he is a trustee only in respect of the designated trusts and not in respect of the legacies and charges, and no express trust is created for their payment: *Cunningham v Foot*(1878) 3 App Cas 974, HL; *Re Barker, Buxton v Campbell*[1892] 2 Ch 491; *Re Lacy, Royal General Theatrical Fund Association v Kydd*[1899] 2 Ch 149 at 156-157 per Stirling J; *Re Hazlette*[1915] 1 IR 285.

5 *Thorp v Owen* (1843) 2 Hare 607 at 616; *Barrs v Fewkes* (1864) 2 Hem & M 60 at 65 per Wood V-C; *Re Bowes, Earl of Strathmore v Vane*[1896] 1 Ch 507; *Re Lipinski's Will Trusts, Gosschalk v Levy*[1976] Ch 235, [1977] 1 All ER 33.

6 *Andrews v Partington* (1790) 2 Cox Eq Cas 223 at 224 per Lord Thurlow LC; *Brown v Casamajor* (1799) 4 Ves 498; *Hammond v Neame* (1818) 1 Swan 35 at 38; *Benson v Whittam, Hemming v Whittam* (1831) 5 Sim 22 at 30 per Shadwell V-C; *Thorp v Owen* (1843) 2 Hare 607 at 611.

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### **C. POSSESSION AND INCIDENTS**

#### **727. Possession of trust estate.**

As against strangers, a trustee and his beneficiary are regarded in equity as one person, so that possession of trust property, whether real or personal, by the beneficiary is in general possession by the trustee<sup>1</sup>. Similarly, while the relation between trustee and beneficiary subsists, the possession of the trust property by the trustee is the possession of the beneficiary<sup>2</sup>. If property is given to the trustee to sell, it remains in him for that purpose until something is done to put an end to the character in which he stands; he is bound to protect the beneficiary's interest, and the length of time during which he has omitted to discharge his trust is no bar to his power or duty to perform it<sup>3</sup>.

Where a trustee has as such taken possession of trust property, he cannot hold it adversely to a beneficiary after his estate as trustee has determined<sup>4</sup>, but his continuance in possession is deemed that of the beneficiary<sup>5</sup>.

1 *Earl of Pomfret v Lord Windsor* (1752) 2 Ves Sen 472 at 481 per Lord Hardwicke LC; *Keene d Lord Byron v Deardon* (1807) 8 East 248 at 263 per Lord Ellenborough CJ; *Parker v Carter* (1845) 4 Hare 400 at 417 per Wigram V-C. As to letting beneficiaries into possession see *Blake v Bunbury* (1790) 1 Ves 194; *Jenkins v Milford* (1820) 1 Jac & W 629; *Baylies v Baylies* (1844) 1 Coll 537; *Horner v Wheelwright* (1857) 2 Jur NS 367; *Warren v Rudall, ex p Godfrey* (1860) 1 John & H 1; *Taylor v Taylor, ex p Taylor* (1875) LR 20 Eq 297; *Re Bentley, Wade v Wilson* (1885) 54 LJ Ch 782. As to the delegation of powers of management to the beneficiary see the Trusts of Land and Appointment of Trustees Act 1996 s 9 (prospectively amended); the Trustee Delegation Act 1999 s 1; and PARAS 985, 987 post. The possession of trust chattels by a beneficiary under the instrument of trust is in law the possession of the trustee: *White v Morris* (1852) 11 CB 1015; *Barker v Furlong* [1891] 2 Ch 172. A beneficiary in actual occupation of trust land is in law tenant at will to the trustee: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 199; LIMITATION PERIODS vol 68 (2008) PARA 1155. As to the security of tenure of business premises where the tenancy is held on trust and business is carried on by the beneficiaries see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 763-764; and as to the effect for limitation purposes of the possession by a beneficiary of land subject to the trust, or of the receiving of a payment by a beneficiary, see LIMITATION PERIODS vol 68 (2008) PARAS 1155, 1202.

2 *Lord Grenville v Blyth* (1809) 16 Ves 224; *Chalmer v Bradley* (1819) 1 Jac & W 51 at 67 per Plumer MR; *Parker v Carter* (1845) 4 Hare 400 at 413-414. See also LIMITATION PERIODS vol 68 (2008) PARA 1156.

3 *Chalmer v Bradley* (1819) 1 Jac & W 51 at 67. As to the effect of the running of time on the right of a beneficiary to recover trust property from a trustee see PARA 1124 post.

4 See the Limitation Act 1980 s 21; and LIMITATION PERIODS vol 68 (2008) PARA 1140 et seq.

5 *Stone v Godfrey* (1854) 5 De GM & G 76 at 92 per Turner LJ.

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## **728. Liability of trustee for legal outgoing and taxes.**

The possession by a trustee of the legal estate or legal ownership of trust property invests him with the legal burdens<sup>1</sup> and privileges incident to that estate or ownership<sup>2</sup>. If the property is leasehold, a trustee is liable to pay the rent reserved by and to perform the covenants contained in the lease under which the property is held<sup>3</sup>.

1 As to payment of income tax in relation to trusts see INCOME TAXATION.

2 *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 251 per Henley, Lord Keeper. As to the trustee's right to reimbursements in respect of the burdens see PARAS 904-905 post. If a trustee conveys land which is wholly surrounded by his own land, the conveyance passes a right to a way of necessity over this land in accordance with the general law relating to ways of necessity: *Howton v Frearson* (1798) 8 Term Rep 50. See EASEMENTS AND PROFITS A PRENDRE. Only the trustee as landlord, and not the beneficiary, may levy distress for rent unpaid: *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79, DC; and see DISTRESS vol 13 (2007 Reissue) PARA 922. As to conversion see PARA 601 note 4 ante.

3 *Walters v Northern Coal Mining Co* (1855) 5 De GM & G 629; *White v Hunt* (1870) LR 6 Exch 32; *Wright v Pitt* (1870) LR 12 Eq 408; *Ramage v Womack* [1900] 1 QB 116. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 39, 561.

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## **729. Right to title deeds.**

A trustee who is the owner of the legal estate in land is normally entitled to the custody of the title deeds and a beneficiary merely has a right to inspect and take copies of the deeds<sup>1</sup>.

<sup>1</sup> *Clayton v Clayton* [1930] 2 Ch 12 at 19. See also *Ex p Holdsworth* (1838) 4 Bing NC 386. As to the right of a tenant for life of settled land to custody of the title deeds, and as to the statutory provisions for the protection of the trustees of the settlement from liability in respect of documents of title placed in the possession of the tenant for life or statutory owner, see SETTLEMENTS vol 42 (Reissue) PARA 771. As to the release of title deeds see PARA 952 post. As to the rights to custody of title deeds generally see DEEDS AND OTHER INSTRUMENTS. See also REAL PROPERTY vol 39(2) (Reissue) PARA 87. As to rights to the transfer, retention and production of title deeds as between vendor and purchaser see SALE OF LAND vol 42 (Reissue) PARAS 131-132. Where, under a settlement of real and personal estate, land was purchased with money advanced by the trustees out of the personal estate and the trustees had a lien on the purchased land in respect of the advance, they were held to be entitled to the custody of the title deeds relating to it so long as their lien existed: *Wheeler v Tootell* (1903) 51 WR 693. See also *Corin v Thomas* (1881) 46 LT 916. As to lien generally see LIEN.

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## **(ii) Transmission on Death or Bankruptcy**

### **730. Death of co-trustee.**

On the death of one of two or more trustees, the right to the trust estate, with all its incidents, belongs to the surviving trustees or trustee<sup>1</sup>.

Where, as is usually the case, the estate is vested in the trustees jointly, the legal interest in it passes to the survivor or survivors<sup>2</sup>.

<sup>1</sup> Co Litt 113a, 181b; *Butler v Lady Bray* (1560) Dyer 189; *Hudson v Hudson* (1735) Cas temp Talb 127; *A-G v Gleg* (1738) 1 Atk 356; *Lane v Debenham* (1853) 11 Hare 188; *Re Bacon*, *Toovey v Turner*[1907] 1 Ch 475. See further PARA 981 post.

<sup>2</sup> See CHOSER IN ACTION vol 13 (2009) PARA 86; COMPANIES vol 14 (2009) PARA 434; MORTGAGE vol 77 (2010) PARA 387; PERSONAL PROPERTY vol 35 (Reissue) PARA 1264.



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### **731. Death of sole trustee.**

All real estate to which a sole or last surviving trustee is entitled for an interest not ceasing on his death, and which is held on any trust, devolves from time to time on his personal representative, notwithstanding any testamentary disposition by the deceased trustee, in the same manner as if it were a chattel real<sup>1</sup>. Probate or administration may be granted in respect of a trust estate only<sup>2</sup>. Where a person dies intestate, his real and personal estate vest in the Public Trustee until the grant of administration; and where a testator dies and (1) at the time of his death there is no executor with power to obtain probate of the will; or (2) at any time before probate of the will is granted there ceases to be any executor with power to obtain probate, the real and personal estate of which he disposes by the will vests in the Public Trustee until the grant of representation<sup>3</sup>.

1 See the Administration of Estates Act 1925 ss 1(1), 3(1)(ii) (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363. As to the powers of the personal representative in relation to trust estates so devolving see s 2 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 438 et seq.

2 See the Supreme Court Act 1981 s 113; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 11-12. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

3 See the Administration of Estates Act 1925 s 9(1), (2) (s 9 as substituted); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34. In relation to deaths on or after 1 January 1995, the vesting of real or personal estate in the Public Trustee does not, however, confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property: see the Administration of Estates Act 1925 s 9(3) (as substituted); the Law of Property (Miscellaneous Provisions) Act 1994 (Commencement No 2) Order 1995, SI 1995/1317; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34. In relation to deaths before that date, the property of the deceased vested in the Public Trustee on that date: see the Law of Property (Miscellaneous Provisions) Act 1994 s 14(2), (3), (4); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34. See also *Practice Direction* [1995] 3 All ER 192, [1995] 1 WLR 1120. As to the Public Trustee see PARA 766 et seq post.

#### **UPDATE**

### **731 Death of sole trustee**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/ (4) THE TRUST ESTATE/(ii) Transmission on Death or Bankruptcy/732. Devolution of settled land on death.

### **732. Devolution of settled land on death.**

Where the legal estate in settled land is vested in a person as being a tenant for life or statutory owner, and at his death the land is so vested in him alone, it devolves on his personal representatives<sup>1</sup>. The persons who are at his death the trustees of the settlement may be appointed, and in default of express appointment will be deemed to have been appointed, by the testator<sup>2</sup> as his special executors in regard to the settled land, and probate may be granted to the trustees specially limited to the settled land<sup>3</sup>.

1 See the Administration of Estates Act 1925 ss 1(1), 3(1)(ii) (s 3(1)(ii) as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 335.

2 Ie the deceased tenant for life or statutory owner.

3 Administration of Estates Act 1925 s 22(1). The testator may appoint other persons to be his general executors in regard to his other property and assets: see s 22(2); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 231. As to the devolution of settled land on death see further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 367 et seq. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante. For these purposes, 'settled land' means land vested in the testator which was settled previously to his death and not by his will: Administration of Estates Act 1925 s 22(1).

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### **733. Effect of bankruptcy on trustee.**

Where a person becomes bankrupt, property held by him on trust for another person does not pass to his trustee in bankruptcy, but remains vested in him upon the trusts to which it is subject<sup>1</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 283(3)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 428. A person's bankruptcy may be a ground for removing him from the office of trustee: see PARAS 824, 836, 900 post. As to execution against trustees see CIVIL PROCEDURE vol 12 (2009) PARA 1326.

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## **(5) BENEFICIARIES UNDER THE TRUST**

### **(i) Estate of Beneficiaries**

#### ***A. EXTENT OF THE ESTATE TAKEN***

#### **734. In general.**

In relation to express trusts the extent of the interest taken by the beneficiary is a matter of the intention of the settlor<sup>1</sup> as expressed in the trust instrument<sup>2</sup>, if any.

1 As to the necessity for certainty in relation to the beneficial interest to be taken see PARA 653 ante.

2 As to the interpretation of written instruments generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

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### 735. Rules of construction.

In the construction of an executed trust<sup>1</sup>, technical terms are to be construed in their legal and technical sense<sup>2</sup>.

Thus where in a deed coming into operation before 1 January 1926 an equitable fee simple was settled, or a legal estate in fee simple was conveyed to trustees and equitable limitations were engrafted on it, then, if technical terms were used in the deed<sup>3</sup>, the limitations must be construed as if they were limitations of the legal estate, and thus the absence of appropriate technical words of limitation would be fatal. If, however, in such a deed strict phraseology was not used, the court may give effect to the settlor's intention, so that, for example, the equitable fee simple would pass, even though no apt words of limitation were used<sup>4</sup>. Similarly, where limitations were by reference to another instrument and the interests conferred by that instrument were absolute interests, the equitable fee simple passed, if the settlor's intention was clear, notwithstanding the absence of words of limitation<sup>5</sup>, and in the case of an executory trust the equitable fee simple passed provided only that the intention was clear that it should<sup>6</sup>. It was immaterial whether the equitable fee simple was created by the deed itself or was an equity of redemption<sup>7</sup>.

In the case of a deed coming into operation after 31 December 1925 the position is different. In deeds executed after that date a conveyance of freehold land to a person without any words of limitation, or any equivalent expression, passes to the grantee the fee simple or other the whole interest which the grantor had power to convey in the land, unless a contrary intention appears<sup>8</sup>. All limitations of future interests in land take effect only in equity<sup>9</sup>. It has not been possible to create an entailed interest since 31 December 1996<sup>10</sup>.

1 As to executed and executory trusts see PARA 626 ante; and as to the interpretation of written instruments generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 164 et seq.

2 *Stanley v Lennard* (1758) 1 Eden 87 at 94-95 per Henley, Lord Keeper; *Wright v Pearson* (1758) 1 Eden 119 at 125 per Henley, Lord Keeper; *Austen v Taylor* (1759) 1 Eden 361 at 366; *Jones v Morgan* (1783) 1 Bro CC 206; *Jervoise v Duke of Northumberland* (1820) 1 Jac & W 559; *Holliday v Overton* (1852) 15 Beav 480; *Lucas v Brandreth (No 2)* (1860) 28 Beav 274; *Meyler v Meyler* (1883) 11 LR Ir 522; *Re Whiston's Settlement, Lovatt v Williamson* [1894] 1 Ch 661; *Re Bennett's Estate* [1898] 1 IR 185; *Sydall v Castings Ltd* [1967] 1 QB 302, [1966] 3 All ER 770, CA. For the principle that equity followed the analogy of legal estates see EQUITY vol 16(2) (Reissue) PARAS 554-555.

3 *Lucas v Brandreth (No 2)* (1860) 28 Beav 274; *Re Whiston's Settlement, Lovatt v Williamson* [1894] 1 Ch 661; *Dearberg v Letchford* (1895) 72 LT 489; *Re Hudson, Kühne v Hudson* (1895) 72 LT 892; *Re Irwin, Irwin v Parkes* [1904] 2 Ch 752; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469, CA (in the absence of any limitation to the children and their 'heirs' the children took life estates only notwithstanding other indications of the settlor's intention to confer absolute interests; the earlier cases were considered and *Re Tringham's Trusts, Tringham v Greenhill* [1904] 2 Ch 487 was overruled). The decisions in *Re Nutt's Settlement, McLaughlin v McLaughlin* [1915] 2 Ch 431 and in *Re Gillies' Settlement, Archer v Penney* [1917] 2 Ch 205, in so far as they are based on *Re Tringham's Trusts, Tringham v Greenhill* supra, would appear also to be overruled: see REAL PROPERTY vol 39(2) (Reissue) PARA 93.

4 *Re Arden, Short v Camm* [1935] Ch 326. See also *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469 at 480, 483, 489-490, CA; *Re Sergie, Shribman v Hall* [1954] NI 1 at 6-8 per Lord Macdermott LC.

5 *Pugh v Drew* (1869) 17 WR 988; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469 at 489-490, CA, per Younger LJ.

6 *Re Oliver's Settlement, Evered v Leigh* [1905] 1 Ch 191; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469 at 485-486, CA, per Warrington LJ. As to executory trusts see PARA 626 ante.

7 *Re Whiston's Settlement, Lovatt v Williamson* [1894] 1 Ch 661; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469 at 480, CA, per Lord Sterndale MR, and at 489 per Younger LJ. The distinction in this respect drawn by Joyce J in *Re Tringham's Trusts, Tringham v Greenhill* [1904] 2 Ch 487 (see note 3 supra) cannot be supported.

8 See the Law of Property Act 1925 s 60(1), (4) (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 242; REAL PROPERTY vol 39(2) (Reissue) PARA 93.

9 See *ibid* s 4(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 46.

10 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; and SETTLEMENTS vol 42 (Reissue) PARA 677. Before that date it was possible to create such an interest, provided that the proper technical words were used: see the Law of Property Act 1925 ss 60(4) proviso (b), 130(1) (both repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

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### **736. Trusts to benefit a person in a specified manner.**

A trust of capital or income for the benefit in some specified manner of a person who is sui juris<sup>1</sup> confers on him an absolute beneficial interest in the capital or income, as the case may be<sup>2</sup>. If the trust in his favour is not limited to his life or some shorter period, it gives him<sup>3</sup>, or, if he becomes bankrupt, his trustee in bankruptcy<sup>4</sup>, the right to call for a transfer of the trust property.

A trust to apply the income of property for the benefit of a person or object in some specified manner or in such manner as the trustees think fit is an absolute trust of the income for that person or object<sup>5</sup>. A trust to apply the whole or part of the income in a specified manner for the benefit of a person is, however, a trust for him of only so much as is necessary for that purpose<sup>6</sup>; and, if the trustees are given a discretion as to the amount to be applied, they are at liberty to exercise that discretion by limiting the amount<sup>7</sup>.

1 As to the management of the property and affairs of persons who lack capacity to make relevant decisions see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

2 *Josselyn v Josselyn* (1837) 9 Sim 63 (direction for maintenance out of income and deferred payment of capital); *Magrath v Morehead* (1871) LR 12 Eq 491 (fund directed to be settled by beneficiaries on themselves on marriage); *Watkins v Watkins* [1896] P 222 at 227, CA, per Lindley LJ; *Re Bowes, Earl of Strathmore v Vane* [1896] 1 Ch 507 (money to be laid out in planting trees on an estate); *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33 (bequest for the construction and improvement of buildings). However, see *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65 (land conveyed to trustees to be used for the benefit of employees as a recreation or sports ground; one interpretation of the judgement is that the beneficial interest is in suspense and the person to be benefited has no more than a right to enforce performance of the trust); *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 222-223, [1985] 1 All ER 155 at 165-166 per Peter Gibson LJ (citing *Re Northern Developments (Holdings) Ltd* (6 October 1978, unreported)). See also PARA 607 ante.

3 *Josselyn v Josselyn* (1837) 9 Sim 63; *Saunders v Vautier* (1841) Cr & Ph 240; *Rocke v Rocke* (1845) 9 Beav 66; but see *Gott v Nairne* (1876) 3 ChD 278. See also PARA 750 et seq post.

4 *Green v Spicer* (1830) 1 Russ & M 395; *Rippon v Norton* (1839) 2 Beav 63; *Kearsley v Woodcock* (1843) 3 Hare 185; *Younghusband v Gisborne* (1844) 1 Coll 400. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 402.

5 *Barlow v Grant* (1684) 1 Vern 255; *Cope v Wilmot* (1772) 1 Coll 396 note (a); *Hanson v Graham* (1801) 6 Ves 239 at 249; *Green v Spicer* (1830) 1 Russ & M 395; *Piercy v Roberts* (1832) 1 My & K 4; *Snowdon v Dales* (1834) 6 Sim 524; *Thompson v Thompson* (1844) 1 Coll 381 at 397-398; *Younghusband v Gisborne* (1844) 1 Coll 400; *Re Sanderson's Trust* (1857) 3 K & J 497 at 503 per Wood V-C; *Re Osoba, Osoba v Osoba* [1979] 2 All ER 393, [1979] 1 WLR 247, CA.

6 *Hanson v Graham* (1801) 6 Ves 239 at 249 per Grant MR; *Re Sanderson's Trust* (1857) 3 K & J 497; *Re Abbott Fund Trusts, Smith v Abbott* [1900] 2 Ch 326.

7 *Leake v Robinson* (1817) 2 Mer 363 at 384 per Grant MR; *Re Sanderson's Trust* (1857) 3 K & J 497 at 507 per Wood V-C. Where a discretionary trust to apply the whole or part of the interest of a fund for the maintenance or support of a person suffering from mental incapacity during his life was created by will, the trustee in bankruptcy of the beneficiary was not entitled to any portion of the provision made for him, even though there was no other object of the discretion: *Twopeny v Peyton* (1840) 10 Sim 487. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 402.

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### 737. Interests determinable on alienation.

Property may be given to or in trust for a person until he anticipates or alienates any part of the capital or income or attempts to do so, whether by bankruptcy or otherwise, and then in trust for some other person or object<sup>1</sup>. If the donee or beneficiary is himself the actual settlor of the property, the gift over is normally valid if the settlor's interest is determined by an event other than his bankruptcy<sup>2</sup>; but if the event purporting to determine his interest is his bankruptcy, the gift over is ineffective as against the settlor's trustee in bankruptcy<sup>3</sup>.

1 *Lockyer v Savage* (1733) 2 Stra 947; *Ex p Cooke* (1803) 8 Ves 353; *Ex p Hinton* (1808) 14 Ves 598; *Ex p Hodgson* (1812) 19 Ves 206; *Manning v Chambers* (1847) 1 De G & Sm 282; *Rochford v Hackman* (1852) 9 Hare 475; *Seymour v Lucas* (1860) 1 Drew & Sm 177; *Billson v Crofts* (1873) LR 15 Eq 314; *Re Aylwin's Trusts* (1873) LR 16 Eq 585; *Re Laye, Turnbull v Laye* [1913] 1 Ch 298; *Re Cooper, Townend v Townend* (1917) 86 LJ Ch 507 (where there was a gift over, on the bankruptcy of a legatee, as if he were then actually dead, to persons who could not be ascertained until his actual death, and there was held to be an intestacy as to the intermediate income until his death); *Re Hamilton, FitzGeorge v FitzGeorge* (1921) 124 LT 737, CA. Where income is directed to be held on protective trusts for the benefit of a person, such a clause contemplates a continuous benefit to the beneficiaries (ie that either the principal beneficiary should enjoy the income or the persons entitled under the discretionary trust should do so): *Re Gourju's Will Trusts, Starling v Custodian of Enemy Property* [1943] Ch 24 at 30, [1942] 2 All ER 605 at 607 per Simmonds J (where the principal beneficiary was deprived of his right to receive income by wartime legislation). The validity of interests determinable on bankruptcy in the context of occupational pension schemes was upheld in *Re Scientific Investment Pension Plan Trusts* [1999] Ch 53, [1998] 3 All ER 154; approved in *Re Malcolm* [2004] EWCA Civ 1748, [2005] 1 WLR 1238, [2005] ICR 611. As to the method of settling property where it is desired to create a determinable interest see the Trustee Act 1925 s 33 (as amended); para 657 ante; and SETTLEMENTS vol 42 (Reissue) PARA 915 et seq. As to the invalidity of restraints upon anticipation or alienation attached to interests otherwise absolute see PARA 743 post.

2 *Brooke v Pearson* (1859) 27 Beav 181; *Knight v Browne* (1861) 30 LJ Ch 649; *Re Detmold, Detmold v Detmold* (1889) 40 ChD 585; *Re Burroughs-Fowler, Burroughs-Fowler's Trustee v Burroughs-Fowler* [1916] 2 Ch 251; *Re Richardson's Will Trusts, Public Trustee v Llewellyn-Evans' Trustee* [1958] Ch 504, [1958] 1 All ER 538. A provision for determination does not of itself render the whole settlement fraudulent: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 405.

3 *Re Meaghan* (1803) 1 Sch & Lef 179; *Higinbotham v Holme* (1811) 19 Ves 88; *Wilson v Greenwood* (1818) 1 Swan 471 at 481 note (a); *Re Burroughs-Fowler, Burroughs-Fowler's Trustee v Burroughs-Fowler* [1916] 2 Ch 251. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 409.



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### 738. Discretionary trusts for a class of beneficiaries.

A settlor may settle property upon exhaustive discretionary trusts under which the trustees in their discretion must distribute trust income among such members of a class of beneficiaries as they see fit and in such shares as they see fit<sup>1</sup>. Each class member has only a hope that the trustees' discretion will be exercised in his favour<sup>2</sup>. He has a right, however, to apply to the court to ensure, directly or indirectly, that the trustee's duties are duly carried out<sup>3</sup>. The trustees must exercise their discretion as income becomes available unless doubts exist as to the validity of the trusts. If, for one reason or another, the discretion is not promptly exercised, it remains exercisable despite the passing of time, but only in favour of such persons as would have been objects of the discretion had it been exercised within a reasonable time<sup>4</sup>. The trustees' discretion must only be exercised in good faith in favour of those within the class of beneficiaries<sup>5</sup>, and the trustees are in the same fiduciary position as other trustees. Where the income accruing to the trustees of a discretionary trust is in favour of a class of beneficiaries which is not closed, the sole members of that class for the time being cannot claim an immediate entitlement to that income so long as there exists a possibility that another member of the class could come into existence before a reasonable time for the distribution of the accrued income has elapsed<sup>6</sup>.

If each class member is sui juris, then, if the members are unanimous, they may require all the income to be distributed to them<sup>7</sup>. Membership of the class of beneficiaries may, however, be so broad that it is impossible to list all the members<sup>8</sup>; in such a case it will be impossible to ascertain that unanimity exists<sup>9</sup>. Under a discretionary trust of capital for class members alive at a specified date (usually designated as the 'closing date' in the settlement), if such class members are adult, sane and unanimous, then, as they are absolutely entitled to capital<sup>10</sup>, they may require the capital to be paid to themselves<sup>11</sup>.

1 The income must be exhausted by the trustees' payments to or for beneficiaries. If the discretionary trusts were non-exhaustive, the trustees could withhold income (eg under a power of accumulation) and the beneficiaries could not object to this: *Sainsbury v IRC* [1970] Ch 712, [1969] 3 All ER 919.

2 *Re Munro's Settlement Trusts* [1963] 1 All ER 209, [1963] 1 WLR 145; *Gartside v IRC* [1968] AC 553, [1968] 1 All ER 121, HL; *Re Weir's Settlement Trusts, Macpherson and Weir v IRC* [1969] 1 Ch 657, [1968] 2 All ER 1241 (revsd [1971] Ch 145, [1970] 1 All ER 297, CA, without casting doubt on relevant dicta in the court of first instance); *Sainsbury v IRC* [1970] Ch 712, [1969] 3 All ER 919. If an object of a discretionary trust assigns his interest or becomes bankrupt, it is clear that the assignee or trustee in bankruptcy cannot, any more than the discretionary beneficiary could have done, demand payment of any part of the fund: *Re Smith, Public Trustee v Aspinall* [1928] Ch 915; *R v Barnet Magistrates' Court, ex p Cantor* [1998] 2 All ER 333, [1999] 1 WLR 334.

3 *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL. The sanction may be an injunction or an order for the removal of the trustees. See *Re Murphy's Settlements* [1998] 3 All ER 1, sub nom *Murphy v Murphy* [1999] 1 WLR 282; and PARA 1071 post.

4 *Re Locker's Settlement Trusts, Meachem v Sachs* [1978] 1 All ER 216, [1977] 1 WLR 1323, DC.

5 This is the position even where trustees are exercising mere powers: *Re Manisty's Settlement, Manisty v Manisty* [1974] Ch 17, [1973] 2 All ER 1203; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

6 *Re Trafford's Settlement, Moore v IRC* [1985] Ch 32, [1984] 1 All ER 1108.

7 *Re Smith, Public Trustee v Aspinall* [1928] Ch 915.

8 *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL; *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, [1972] 2 All ER 1304, CA. See further PARA 657 ante.

9 In such a case a beneficiary's rights are similar to those of a residuary legatee while the testator's estate is in the course of administration: cf *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694, [1964] 3 All ER 692, PC.

10 *Saunders v Vautier* (1841) 4 Beav 115; and see PARA 749 post.

11 The extent to which a discretionary beneficiary can be said to have an interest in the trust income or capital for the purposes of taxation legislation depends on the context: see *Gartside v IRC* [1968] AC 553, [1968] 1 All ER 121, HL; *Leedale v Lewis* [1982] 3 All ER 808, [1982] 1 WLR 1319, HL; para 751 post; and INHERITANCE TAXATION vol 24 (Reissue) PARA 479.

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### **739. Statutory right of beneficiaries to occupy trust land.**

A beneficiary<sup>1</sup> who is beneficially entitled<sup>2</sup> to an interest in possession<sup>3</sup> in land subject to a trust of land<sup>4</sup> is entitled by reason of his interest to occupy the land at any time if at that time the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or the land is held by the trustees so as to be so available<sup>5</sup>. This does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him<sup>6</sup>.

Where two or more beneficiaries are, or otherwise would be<sup>7</sup>, entitled to occupy land, the trustees of land<sup>8</sup> may exclude or restrict the entitlement of any one or more (but not all) of them<sup>9</sup>. Trustees may not unreasonably exclude any beneficiary's entitlement to occupy land, or restrict any such entitlement to an unreasonable extent<sup>10</sup>. The trustees of land may from time to time impose reasonable conditions<sup>11</sup> on any beneficiary in relation to his occupation of land by reason of his entitlement under these provisions<sup>12</sup>. In exercising such powers, the trustees must have regard to: (1) the intentions of the person or persons (if any) who created the trust; (2) the purposes for which the land is held; and (3) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land<sup>13</sup>.

The powers conferred on trustees by these provisions may not be exercised so as to prevent any person who is in occupation of land<sup>14</sup> from continuing to occupy the land, or in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval<sup>15</sup>.

These provisions apply, with appropriate modifications, to personal representatives<sup>16</sup>.

The county court has jurisdiction under these provisions, whatever the amount involved, and whatever the value of any fund or asset connected with the proceedings<sup>17</sup>.

1 For the purposes of the Trusts of Land and Appointment of Trustees Act 1996, 'beneficiary', in relation to a trust, means any person who under the trust has an interest in property subject to the trust (including a person who has such an interest as a trustee or a personal representative): s 22(1).

2 References to a beneficiary who is beneficially entitled do not include a beneficiary who has an interest in property subject to the trust only by reason of being a trustee or personal representative: *ibid* s 22(2).

3 A person who is a beneficiary only by reason of being an annuitant is not to be regarded as entitled to an interest in possession in land subject to the trust: *ibid* s 22(3).

4 For the meaning of 'trust of land' see PARA 605 note 5 ante.

5 Trusts of Land and Appointment of Trustees Act 1996 s 12(1). Section 12 is subject to s 13 (see the text and notes 7-15 *infra*).

6 *Ibid* s 12(2).

7 *Ie* apart from *ibid* s 13(1) (see the text to note 9 *infra*).

8 For the meaning of 'trustees of land' see PARA 724 note 7 ante.

9 Trusts of Land and Appointment of Trustees Act 1996 s 13(1). Where the property lends itself to physical partition the trustee may exclude or restrict one beneficiary's right to occupy one part whilst at the same time excluding or restricting another beneficiary's right to occupy the other part: *Rodway v Landy* [2001] EWCA Civ 471, [2001] Ch 703.

10 Trusts of Land and Appointment of Trustees Act 1996 s 13(2).

11 Such conditions may include, in particular, conditions requiring him to pay any outgoings or expenses in respect of the land, or to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there: *ibid* s 13(5). Where the entitlement of any beneficiary to occupy land under s 12 (see the text and notes 1-6 *supra*) has been excluded or restricted, the conditions which may be imposed on any other beneficiary under s 13(3) include, in particular, conditions requiring him to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or to forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary: s 13(6).

12 *Ibid* s 13(3).

13 *Ibid* s 13(4).

14 *Ie* whether or not by reason of an entitlement under *ibid* s 12 (see the text and notes 1-6 *supra*).

15 *Ibid* s 13(7). In determining whether to give approval, the court must have regard to the matters mentioned in heads (1)-(3) in the text: s 13(8).

16 See *ibid* s 18.

17 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(p) (added by SI 1996/3141).

## UPDATE

### 739 Statutory right of beneficiaries to occupy trust land

NOTE 11--Although a beneficiary without entitlement under the 1996 Act s 12 to occupy land cannot claim compensation under s 13(6), he may be able to claim equitable compensation (or charge occupation rent): *Re Barcham* [2008] EWHC 1505 (Ch), [2009] 1 All ER 145 (trustee in bankruptcy's entitlement to occupation rent from bankrupt's spouse).

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## **B. DEALINGS WITH BENEFICIAL INTERESTS**

### **740. Power of alienation.**

A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest under the trust as a legal owner has over his legal estate or interest in property<sup>1</sup>, and he can exercise it by similar instruments and with similar formalities<sup>2</sup>.

1 *Hopkins v Hopkins* (1739) West temp Hard 606 at 621 per Lord Hardwicke LC; *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 127 per Arden MR. See also EQUITY vol 16(2) (Reissue) PARA 601 et seq; PERSONAL PROPERTY vol 35 (Reissue) PARA 1249 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 229 et seq.

2 *Wagstaff v Wagstaff* (1724) 2 P Wms 258; *Adlington v Cann* (1744) 3 Atk 141 at 151 per Lord Hardwicke LC; *Jones v Clough* (1751) 2 Ves Sen 365 at 366 per Strange MR; *Donaldson v Donaldson* (1854) Kay 711 at 720 per Wood V-C. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 23-26. A person beneficially interested in trust property can only alienate his interest by an instrument in writing inter vivos signed by him or by his will: see the Law of Property Act 1925 s 53(1)(c); and *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL. The refusal by a beneficiary for life to receive the income of the trust property during a certain period does not preclude him from retracting his refusal and claiming to receive it afterwards: *Re Young, Fraser v Young* [1913] 1 Ch 272.

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## 741. Notice to the trustee.

Although notice to the trustee of a disposition of an equitable estate or interest is not essential to the validity of the disposition<sup>1</sup>, such notice has, as regards an equitable interest in pure personalty or in the proceeds of sale of land held upon trust, for many years regulated the priority of competing claimants to that interest<sup>2</sup>, and, since 31 December 1925, has regulated also the priority of equitable interests in land and in capital money arising under the Settled Land Act 1925<sup>3</sup> and the Acts superseded by that Act<sup>4</sup>.

Under this doctrine of priority by notice<sup>5</sup>, as modified by statute<sup>6</sup>, where two or more persons claim to be assignees of an equitable interest in property, they are entitled as between themselves to priority in the order of time in which effective notice in writing<sup>7</sup> is received or deemed to have been received<sup>8</sup>.

<sup>1</sup> *Donaldson v Donaldson* (1854) Kay 711 at 719; *Re Lowes' Settlement* (1861) 30 Beav 95 at 97; *Re Way's Trusts* (1864) 2 De GJ & Sm 365. As to notice to trustees generally see CHOSSES IN ACTION vol 13 (2009) PARA 80 et seq; MORTGAGE vol 77 (2010) PARA 267 et seq.

<sup>2</sup> *Dearle v Hall, Loveridge v Cooper* (1828) 3 Russ 1; *Foster v Cockerell* (1835) 3 Cl & Fin 456, HL; *Meux v Bell* (1841) 1 Hare 73 at 83 et seq per Wigram V-C; *Stocks v Dobson* (1853) 4 De GM & G 11 at 17 per Turner LJ; *Lee v Howlett* (1856) 2 K & J 531; *Browne v Savage* (1859) 4 Drew 635 at 639 per Kindersley V-C; *Re Freshfield's Trust* (1879) 11 ChD 198; *Arden v Arden* (1885) 29 ChD 702; *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460; CA; *Ward v Duncombe* [1893] AC 369 at 376 et seq, HL, per Lord Herschell LC.

<sup>3</sup> See SETTLEMENTS vol 42 (Reissue) PARA 795 et seq.

<sup>4</sup> See the Law of Property Act 1925 s 137; and CHOSSES IN ACTION vol 13 (2009) PARA 45; SALE OF LAND vol 42 (Reissue) PARAS 320-321.

<sup>5</sup> The doctrine of priority by notice does not apply to a declaration of trust relating to an equitable interest: *Hill v Peters* [1918] 2 Ch 273 (but see Lord Cohen's explanation of this case in *BS Lyle Ltd v Rosher* [1958] 3 All ER 597 at 609, [1959] 1 WLR 8 at 23, HL). As to when priority by notice is unobtainable see CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq; and as to a stop order constituting notice in the case of a fund in court see CHOSSES IN ACTION vol 13 (2009) PARA 55.

<sup>6</sup> See the Law of Property Act 1925 ss 137, 138 (both as amended); and CHOSSES IN ACTION vol 13 (2009) PARA 45 et seq.

<sup>7</sup> As to what constitutes effective notice see CHOSSES IN ACTION vol 13 (2009) PARA 46 et seq. As to the sufficiency of notice to the solicitors of trustees see CHOSSES IN ACTION vol 13 (2009) PARA 57; LEGAL PROFESSIONS vol 66 (2009) PARA 794.

<sup>8</sup> This rule is known as the rule in *Dearle v Hall* (see *Dearle v Hall, Loveridge v Cooper* (1828) 3 Russ 1). The rule has no application where the assignor had no beneficial interest and had not deprived himself of one by voluntarily divesting himself of it: *BS Lyle Ltd v Rosher* [1958] 3 All ER 597, [1959] 1 WLR 8, HL.

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## **742. Trustee's duty towards assigns and incumbrancers.**

A trustee stands in the same fiduciary relation and has the same duties towards the assigns of a beneficiary or towards persons in whose favour a beneficiary has given a charge on the trust property as towards the beneficiary himself<sup>1</sup>. Notwithstanding a mortgagee's statutory power to give receipts<sup>2</sup>, a trustee is not bound to hand over to the mortgagee of a beneficiary's share the whole of the share which the beneficiary was entitled to receive, and does not act unreasonably in refusing to do so where, to his knowledge, a question exists as to the mortgagee's right to the whole of the share<sup>3</sup>. He may not, however, require an assignee of the share of a beneficiary to deliver to him the assignment and other documents of title before handing over the share<sup>4</sup>.

<sup>1</sup> *Wellesley v Wellesley* (1839) 4 My & Cr 561 at 578 per Lord Cottenham LC; *Davis v Hutchings* [1907] 1 Ch 356 at 361.

<sup>2</sup> See MORTGAGE vol 77 (2010) PARA 472.

<sup>3</sup> *Re Bell, Jeffery v Sayles* [1896] 1 Ch 1, CA; *Hockey v Western* [1898] 1 Ch 350, CA.

<sup>4</sup> *Re Palmer, Lancashire and Yorkshire Reversionary Interest Co v Burke* [1907] 1 Ch 486.

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### 743. Trusts in restraint of alienation.

Where a trust confers in other respects an absolute estate or interest in property on a beneficiary of full age and sound mind, whether for life or altogether, a provision in restraint of the anticipation or alienation of either the capital or the income of the property, whether by bankruptcy or otherwise, or a provision that it is not to be liable to the claims of creditors, is void<sup>1</sup>, as it would deprive the interest given of one of its legal incidents<sup>2</sup>. It makes no difference that a discretion is given to the trustee as to the mode of applying the capital or income for the benefit of the beneficiary<sup>3</sup>. However, a gift to a beneficiary until he becomes bankrupt or attempts to alienate his interest is good<sup>4</sup>.

1 *Bradley v Peixoto* (1797) 3 Ves 324; *Brandon v Robinson* (1811) 18 Ves 429; *Graves v Dolphin* (1826) 1 Sim 66; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176. See also GIFTS vol 52 (2009) PARAS 251-256; REAL PROPERTY vol 39(2) (Reissue) PARA 146. A covenant not to alienate is not repugnant to the power of alienation; the covenantee may recover damages (which may be nominal) for breach of the covenant: *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753, [1974] 1 WLR 1303, CA. As to bankrupts and their rights under an annuity contract or pensions scheme containing a restriction against alienation see *Krasner v Dennison, Lawrence v Lesser* [2001] Ch 76, [2000] 3 All ER 234, CA.

2 Co Litt 222b et seq; *Brandon v Robinson* (1811) 18 Ves 429 at 433 per Lord Eldon LC; *Ross v Ross* (1819) 1 Jac & W 154 at 156 per Plumer MR; *Ware v Cann* (1830) 10 B & C 433; *Hood v Oglander* (1865) 34 Beav 513; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176 at 179 et seq per Kay J; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131. A disposition in trust which tends directly to contravene the law is bad, whether in respect of real or personal estate: *Holmes v Godson* (1856) 8 De GM & G 152 at 159 et seq per Turner LJ.

3 *Green v Spicer* (1830) 1 Russ & M 395; *Piercy v Roberts* (1832) 1 My & K 4; *Snowdon v Dales* (1834) 6 Sim 524; *Younghusband v Gisborne* (1844) 1 Coll 400.

4 *Brandon v Robinson* (1811) 18 Ves 429; *Rochford v Hackman* (1852) 9 Hare 475; *Re Leach* [1912] 2 Ch 422; *Re Trusts of the Scientific Investment Pension Plan* [1999] Ch 53, [1998] 3 All ER 154 (where Rattee J said at 59 and 158 that the distinction between an interest on condition and a determinable interest was 'not a particularly attractive one, being based on form rather than substance'). See also PARA 737 ante.



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## (ii) Capital and Income

### 744. Receipts.

The beneficiary for life of property held on trusts under which beneficiaries are entitled in succession is normally entitled to the income of the trust property, and thus to receipts of that character<sup>1</sup>. A beneficiary for life is generally entitled to casual profits accruing in respect of the trust property<sup>2</sup>, but the terms of the Settled Land Act 1925 or of the trust may exclude this<sup>3</sup>.

<sup>1</sup> See generally SETTLEMENTS vol 42 (Reissue) PARA 944 et seq. As to realty see *Casamajor v Strobe* (1809) 19 Ves 390n. It may be difficult to determine whether a receipt is of an income or capital nature particularly in relation to distributions by companies. As to the classification of receipts generally see *IRC v John Lewis Properties Ltd*[2002] EWCA Civ 1869 at [80] et seq, [2003] Ch 513 at [80] et seq per Dyson LJ. As to company distributions see *Hill v Permanent Trustee Company of New South Wales Ltd*[1930] AC 720, [1930] All ER Rep 87, PC (cash dividend from capital profits); *Irving v Houstoun* (1803) 4 Paton Sc App 521, HL; *Bouche v Sproule*(1885) 12 App Cas 385, HL (issue of bonus shares); *Re Malam, Malam v Hitchens*[1894] 3 Ch 578; *Re Atkinson, Barbers' Co v Grose-Smith*[1904] 2 Ch 160, CA; *IRC v Fisher's Executors*[1926] AC 395, HL; *Re Bates, Mountain v Bates*[1928] Ch 682, 97 LJ Ch 240 (cash dividend from capital profits); *IRC, Bengal v Mercantile Bank of India Ltd*[1936] AC 478, [1936] 2 All ER 857, PC; *Re Doughty, Burrige v Doughty* [1947] Ch 263, [1947] 1 All ER 207, CA; *Re Harrison's Will Trusts, Re Harrison's Settlement, Harrison v Milborne-Swinnerton-Pilkington*[1949] Ch 678; *Re Sechiari, Argenti v Sechiari*[1950] 1 All ER 417 (stock issue by way of capital profits dividend); *Re Duff's Settlements, National Provincial Bank Ltd v Gregson*[1951] Ch 923 [1951] 2 All ER 534, CA; *Re Kleinwort's Settlements, Westminster Bank Ltd v Bennett*[1951] Ch 860, [1951] 2 All ER 328; *Re Maclaren's Settlement Trusts, Royal Exchange Assurance v Maclaren*[1951] 2 All ER 414; *Re Winder's Will Trust, Westminster Bank Ltd v Fausset*[1951] Ch 916, [1951] 2 All ER 362; *Re Rudd's Will Trusts, Wort v Rudd*[1952] 1 All ER 254, [1952] WN 49; *Re Outen's Will Trusts, Starling v Outen*[1963] Ch 291, [1962] 3 All ER 478; *Sinclair v Lee*[1993] Ch 497, sub nom *Re Lee, Sinclair v Lee*[1993] 3 All ER 926 (based on a narrow distinction from previously decided cases). See also *Capital and Income In Trusts: Classification and Apportionment* (Law Com no 175) (2004).

<sup>2</sup> See *Brigstocke v Brigstocke*(1878) 8 ChD 357 at 363, CA; *Noble v Cass* (1828) 2 Sim 343; *Re Hunloke's Settled Estates, Fitzroy v Hunloke*[1902] 1 Ch 941 at 944; *Re Lacon's Settlement, Lacon v Lacon*[1911] 2 Ch 17, CA; *Re Dealtry, Davenport v Dealtry* (1913) 108 LT 832. However, as regards these decisions, see now the Settled Land Act 1925 ss 52(7), 80(1), (4)-(6); and SETTLEMENTS vol 42 (Reissue) PARAS 948-949. For illustrations of casual profits see SETTLEMENTS vol 42 (Reissue) PARA 944. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

<sup>3</sup> *Re Pyke, Birnstingl v Birnstingl*[1912] 1 Ch 770.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(5) BENEFICIARIES UNDER THE TRUST/(ii) Capital and Income/745. Income pending sale.

### **745. Income pending sale.**

Where a legal estate in land is settled land, then, subject to the terms of the disposition, the tenant for life is entitled to the net income<sup>1</sup>, and the position is the same in the case of a trust of land<sup>2</sup>. If, however, where the disposition is a residuary bequest by will, personal property which is not itself an authorised investment within the terms of the trust is retained under a power to postpone sale pending conversion, the tenant for life is entitled, unless the trust disposition provides otherwise, only to interest at the current percentage rate on the value of the property, the actual income being apportioned<sup>3</sup>. An interest under a trust for sale of land will not pass under a gift of residuary personalty but under a gift of residuary realty<sup>4</sup>.

1 See SETTLEMENTS vol 42 (Reissue) PARA 944. In the case of mining rents there is statutory provision for capitalisation of part: see the Settled Land Act 1925 s 47; and SETTLEMENTS vol 42 (Reissue) PARAS 843, 947. As to the payment of expenses of management out of income see s 102(3); and PARA 748 post. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

2 This was laid down in relation to a trust for sale of land by the Law of Property Act 1925 s 28(2) (repealed) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 541), which in effect made statutory the pre-existing law (see *Re Searle*, *Searle v Baker* [1900] 2 Ch 829 at 834; *Re Oliver*, *Wilson v Oliver* [1908] 2 Ch 74; *Re Woodhouse*, *Public Trustee v Woodhouse* [1941] Ch 332, [1941] 2 All ER 265). Despite the repeal of the Law of Property Act 1925 s 28(2) by the Trusts of Land and Appointment of Trustees Act 1996, it is thought that there is little doubt but that the life tenant is entitled to the net income. A trust for sale of land is now subsumed under a trust of land: see ss 1, 4, 5; para 605 note 5 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 66. For the meaning of 'trust of land' see PARA 605 note 5 ante.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 540; SETTLEMENTS vol 42 (Reissue) PARA 945. This consequence flows from the principle known as the rule in *Howe v Earl of Dartmouth* (see *Howe v Earl of Dartmouth*, *Howe v Countess of Aylesbury* (1802) 7 Ves 137), which applies in practice whether or not there is a trust for conversion: see *Re Berry*, *Lloyds Bank Ltd v Berry* [1962] Ch 97 at 106, [1961] 1 All ER 529 at 535 per Pennycuik J. As to the current rate of interest see SETTLEMENTS vol 42 (Reissue) PARA 945. See also *Capital and Income In Trusts: Classification and Apportionment* (Law Com no 175) (2004).

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 3; and REAL PROPERTY vol 39(2) (Reissue) PARA 77.

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## 746. Reversionary and wasting property.

On the principle that the donor intended all beneficiaries to whom he has given interests in succession by way of trusts to enjoy the whole trust property in succession<sup>1</sup>, trustees are under a duty, subject to the terms of the trust instrument or of statute<sup>2</sup>, to realise reversionary or future interests in personal estate for the sake of beneficiaries for life and to convert wasting personal property for the benefit of beneficiaries in remainder<sup>3</sup>, and to lay out the proceeds realised in permanent investments<sup>4</sup>. Similarly, if reversionary interests in personalty fall in after the establishment of the trust, then, subject to the provisions of the trust instrument, the sum received is apportionable between tenant for life and remaindermen<sup>5</sup>. This principle does not apply to real estate<sup>6</sup> or, it seems, where the property is settled by deed<sup>7</sup>, but only to residuary bequests of personalty<sup>8</sup>.

Except so far as they are expressly authorised or permitted by law or by the instrument creating the trusts<sup>9</sup>, trustees cannot by their acts or conduct alter the rights and interests of successive beneficiaries in the capital and income of the trust property<sup>10</sup>. The creator of a trust may, however, evince by the trust instrument an intention that wasting property is to be enjoyed by a beneficiary for life in specie<sup>11</sup>, for example by its being specifically designated<sup>12</sup>, or by a discretionary power of sale being given to the trustee<sup>13</sup>, or by a direction to sell or divide the property after the death of the beneficiary for life<sup>14</sup>, or by making the consent of the tenant for life requisite both for conversion and the postponement of conversion<sup>15</sup>. In the absence of such an intention being indicated, it is presumed that wasting property is to be converted<sup>16</sup>, but the inference of intention is much weaker, if it arises at all, in the case of an absolute gift with an executory limitation over<sup>17</sup>.

1 See *Howe v Earl of Dartmouth*, *Howe v Countess of Aylesbury* (1802) 7 Ves 137 at 148 per Lord Eldon LC; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 540. See also *Capital and Income In Trusts: Classification and Apportionment* (Law Com no 175) (2004).

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 540-541.

3 *Howe v Earl of Dartmouth*, *Howe v Countess of Aylesbury* (1802) 7 Ves 137 at 148. See eg *Thornton v Ellis* (1852) 15 Beav 193; *Countess of Harrington v Atherton* (1864) 2 De GJ & Sm 352; *Tickner v Old* (1874) LR 18 Eq 422; *Porter v Baddeley* (1877) 5 ChD 542; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 540, 558; SETTLEMENTS vol 42 (Reissue) PARA 944 et seq. The principle does not after 31 December 1925 apply to leaseholds held on trust for sale: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 541. A trust for sale of land is now subsumed under a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 4, 5; and PARA 605 note 5 ante. As to leasehold property abroad see *Re Moses*, *Moses v Valentine* [1908] 2 Ch 235 (different rule of law prevailing by foreign law); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 456.

4 *Meyer v Simonsen* (1852) 5 De G & Sm 723 at 726 per Parker V-C.

5 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 545; SETTLEMENTS vol 42 (Reissue) PARA 946. See also *Re Hobson*, *Walter v Appach* (1885) 55 LJ Ch 422.

6 *Re Woodhouse*, *Public Trustee v Woodhouse* [1941] Ch 332, [1941] 2 All ER 265.

7 At any rate the principle does not apply where the deed contains no trust for conversion: *Re Van Straubenzee*, *Boustead v Cooper* [1901] 2 Ch 779; *Milford v Peile* (1854) 17 Beav 602; *Askew v Woodhead* (1880) 14 ChD 27, CA.

8 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 540; SETTLEMENTS vol 42 (Reissue) PARAS 945, 951.

9 See eg *Alcock v Sloper* (1833) 2 My & K 699; *Cockburn v Peel* (1861) 3 De GF & J 170 at 174 per Turner LJ; *Hume v Richardson* (1862) 4 De GF & J 29 at 32-33 per Turner LJ; *Re Sewell's Estate* (1870) LR 11 Eq 80; *Thursby v Thursby* (1875) LR 19 Eq 395; *Gray v Siggers* (1880) 15 ChD 74; *Re Sheldon, Nixon v Sheldon* (1888) 39 ChD 50; *Re Thomas, Wood v Thomas* [1891] 3 Ch 482; *Re Crowther, Midgley v Crowther* [1895] 2 Ch 56; *Re Pitcairn, Brandreth v Colvin* [1896] 2 Ch 199; *Re Godfree, Godfree v Godfree* [1914] 2 Ch 110; *Re Pennington, Pennington v Pennington* [1914] 1 Ch 203, CA.

10 *Walker v Shore* (1815) 19 Ves 387 at 392; *Caldecott v Caldecott* (1842) 1 Y & C Ch Cas 737; *Morgan v Morgan* (1851) 14 Beav 72; *Wilkinson v Duncan* (1857) 23 Beav 469; *Re Llewellyn's Trusts* (1861) 29 Beav 171; *Wright v Lambert* (1877) 6 ChD 649.

11 See eg *Lord v Godfrey* (1819) 4 Madd 455; *Pickering v Pickering* (1839) 4 My & Cr 289; *Goodenough v Tremamondo* (1840) 2 Beav 512; *Harvey v Harvey* (1842) 5 Beav 134; *Cockran v Cockran* (1844) 14 Sim 248; *Hunt v Scott* (1847) 1 De G & Sm 219; *Milne v Parker* (1848) 12 Jur 171; *Howe v Howe* (1849) 14 Jur 359; *Harris v Poyner* (1852) 1 Drew 174; *Hind v Selby* (1856) 22 Beav 373; *Simpson v Lester* (1858) 4 Jur NS 1269; *Re Pfleger* (1868) LR 6 Eq 426; *Lean v Lean* (1875) 23 WR 484; *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42, CA; *Re Bland, Miller v Bland* [1899] 2 Ch 336; *Re Bentham, Pearce v Bentham* (1906) 94 LT 307; *Re Bates, Hodgson v Bates* [1907] 1 Ch 22; *Re Wilson, Moore v Wilson* [1907] 1 Ch 394; *Re North, Garton v Cumberland* [1909] 1 Ch 625; *Re Nicholson, Eade v Nicholson* [1909] 2 Ch 111; *Re Elford, Elford v Elford* [1910] 1 Ch 814; *Re Inman, Inman v Inman* [1915] 1 Ch 187 (effect of a power to postpone conversion considered); *Re Gough, Phillips v Simpson* [1957] Ch 323, [1957] 2 All ER 193. Cf *Re Slater, Slater v Jonas* (1915) 85 LJ Ch 432 (farming business bequeathed upon trust for sale with a power to postpone).

12 *Bethune v Kennedy* (1835) 1 My & Cr 114; *D'Aglié v Fryer* (1841) 12 Sim 1; *Phillips v Sarjent* (1848) 7 Hare 33; *Re Beaufoy's Estate* (1852) 1 Sm & G 20; *Howard v Kay* (1858) 27 LJ Ch 448; *Re Money's Trusts* (1862) 2 Drew & Sm 94; *Wilday v Sandys* (1869) LR 7 Eq 455; *Re Van Straubenzee, Boustead v Cooper* [1901] 2 Ch 779 at 782 per Cozens-Hardy J; *Stanier v Hodgkinson* (1903) 73 LJ Ch 179. Abstention from conversion is required where the property in its actual state is specifically settled in trust (*Collins v Collins* (1833) 2 My & K 703; *Daniel v Warren* (1843) 2 Y & C Ch Cas 290; *Hinves v Hinves* (1844) 3 Hare 609) or specific directions are given as to its income (*Goodenough v Tremamondo* (1840) 2 Beav 512; *Cafe v Bent* (1845) 5 Hare 24; *Neville v Fortescue* (1848) 16 Sim 333; *Vachell v Roberts* (1863) 32 Beav 140; *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42, CA; *Re Sherry, Sherry v Sherry* [1913] 2 Ch 508). See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 541.

13 *Re Leonard, Theobald v King* (1880) 29 WR 234; *Re Sherry, Sherry v Sherry* [1913] 2 Ch 508.

14 *Alcock v Sloper* (1833) 2 My & K 699; *Holgate v Jennings* (1857) 24 Beav 623; *Re Barratt, National Provincial Bank Ltd v Barratt* [1925] Ch 550. Cf, however, *Re Evans' Will Trusts, Pickering v Evans* [1921] 2 Ch 309.

15 *Re Rogers, Public Trustee v Rogers* [1915] 2 Ch 437.

16 See eg *Benn v Dixon* (1840) 10 Sim 636; *Sutherland v Cooke* (1844) 1 Coll 498; *Chambers v Chambers* (1846) 15 Sim 183; *Prendergast v Prendergast* (1850) 3 HL Cas 195 at 218-219 per Lord Brougham; *Hood v Clapham* (1854) 19 Beav 90; *Craig v Wheeler* (1860) 29 LJ Ch 374; *Re Shaw's Trusts* (1871) LR 12 Eq 124; *Macdonald v Irvine* (1878) 8 ChD 101, CA; *Re Game, Game v Young* [1897] 1 Ch 881; *Re Wareham, Wareham v Brewin* [1912] 2 Ch 312, CA. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 540-541. The use of the word 'rents' does not rebut the presumption as to leaseholds where there are also freeholds: *Re Game, Game v Young* supra; *Re Wareham, Wareham v Brewin* supra. The presumption does not apply after 31 December 1925 to leaseholds held on trust for sale: see note 3 supra; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 541.

17 *Re Bland, Miller v Bland* [1899] 2 Ch 336; *Re Hammersley, Heasman v Hammersley* (1899) 81 LT 150.

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### **747. Annuities and contingent legacies.**

Where an annuity for a term of years forms part of a residue bequeathed in trust and cannot conveniently be sold, the instalments of it until sale form part of the capital of the trust property and must be invested, the interest of the investments being payable to the tenant for life<sup>1</sup>. However, as between the beneficiaries for life and in remainder under the will of a testator who has covenanted to pay an annuity, the sums paid and to be paid to the annuitants are apportionable between capital and income<sup>2</sup>. Where funds set apart under the will of a testator to answer contingent legacies and a discretionary annuity given by that will form part of the settled residue of another testator, then, as between the tenant for life and remaindermen under the will of the second testator, the income of the legacy fund is to be treated as a terminable annuity and goes to residue as capital, while the surplus income of the annuity fund goes to residue as income<sup>3</sup>.

Where contingent legacies are given by a will<sup>4</sup>, and where annuities are not payable until after the death of a named person<sup>5</sup>, the income of the fund set aside to answer the legacies or annuities, if falling into residue, is to be treated as income and not as capital<sup>6</sup>.

1 *Crawley v Crawley* (1835) 7 Sim 427; *Re Whitehead, Peacock v Lucas* [1894] 1 Ch 678. See also *Re Hey's Settlement Trusts, Hey v Nickell-Lean* [1945] Ch 294, [1945] 1 All ER 618 (annual payments received by the testator's estate from property not forming part of his estate treated as analogous to terminable annuities and the instalments held to be capital); *Re Guinness's Settlement, Guinness v SG Warburg (Executor and Trustee) Ltd* [1966] 2 All ER 497, [1966] 1 WLR 1355. In the last two cases it was held that prima facie the equitable rule of apportionment in *Re Earl of Chesterfield's Trusts* (1883) 24 ChD 643 (see SETTLEMENTS vol 42 (Reissue) PARA 946) should apply; and it is difficult to see why it should not also apply to the first two cited cases. See also *Capital and Income In Trusts: Classification and Apportionment* (Law Com no 175) (2004).

2 *Re Dawson, Arathoon v Dawson* [1906] 2 Ch 211; *Re Perkins, Brown v Perkins* [1907] 2 Ch 596; *Re Poyser, Landon v Poyser* [1910] 2 Ch 444; *Re Earl of Berkeley, Inglis v Countess of Berkeley* [1968] Ch 744, [1968] 3 All ER 364, CA. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 539; RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 830.

3 *Re Whitehead, Peacock v Lucas* [1894] 1 Ch 678.

4 *Allhusen v Whittell* (1867) LR 4 Eq 295.

5 *Cranley v Dixon* (1857) 23 Beav 512.

6 *Cranley v Dixon* (1857) 23 Beav 512; *Allhusen v Whittell* (1867) LR 4 Eq 295 at 303-304.

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## **748. Outgoings and expenses.**

Subject to the provisions of the trust instrument in any particular case and, as regards land, to statutory provisions<sup>1</sup>, where property is held in trust for persons entitled in succession the general principle is that income must bear all ordinary outgoings of a recurrent nature, such as rates and taxes and interest on charges and incumbrances<sup>2</sup>. Capital must bear all costs, charges and expenses incurred for the benefit of the whole estate<sup>3</sup>.

Expenses to be charged to income have been held to include losses in a trade or business properly carried on under the trust<sup>4</sup>, and the expenses of proceedings relating exclusively to income<sup>5</sup>.

Expenses to be charged to capital have been held to include:

- 49 (1) all costs, charges and expenses of and incidental to the administration and protection of the estate<sup>6</sup>, including the costs of obtaining legal advice<sup>7</sup> and, except where the proceedings relate exclusively to income<sup>8</sup>, of legal proceedings<sup>9</sup>, and the costs of and incidental to the appointment of new trustees<sup>10</sup> and of making or changing investments<sup>11</sup>; and
- 50 (2) satisfaction of the capital element of all charges and incumbrances on the property<sup>12</sup>, including calls on shares<sup>13</sup>.

The incidence of premiums on an insurance policy forming part of the trust estate will be decided by applying the general principle; if the premiums are paid for the benefit of the whole estate they are properly paid out of capital<sup>14</sup>.

1 See the Settled Land Act 1925 s 102(3), (6); and SETTLEMENTS vol 42 (Reissue) PARAS 665-666.

2 *Shore v Shore* (1859) 4 Drew 501; *Bosanquet v Allen*, *Carver v Duncan* [1985] AC 1082 at 1120, [1985] 2 All ER 645 at 652, HL, per Lord Templeman. See also SETTLEMENTS vol 42 (Reissue) PARA 961 et seq; Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 694 et seq; *Capital and Income In Trusts: Classification and Apportionment* (Law Com no 175) (2004). As to the view of Her Majesty's Revenue and Customs on capital and income under trust law see HMRC Guidance *Trust Management Expenses* (31 January 2006).

3 *Re Bennett, Jones v Bennett* [1896] 1 Ch 778; *Bosanquet v Allen*, *Carver v Duncan* [1985] AC 1082 at 1120, [1985] 2 All ER 645 at 652, HL, per Lord Templeman. See also note 2 supra.

4 *Upton v Brown* (1884) 26 ChD 588. An exception exists where it has been the practice of the particular trade or business to charge losses against capital: *Gow v Forster* (1884) 26 ChD 672. As to when a trade or business ought to be disposed of and is carried on temporarily until it can be sold advantageously see *Re Hengler*, *Frowde v Hengler* [1893] 1 Ch 586.

5 See the text and note 8 infra.

6 *Lord Brougham v Lord Poulett* (1855) 19 Beav 119; *Sanders v Miller* (1858) 25 Beav 154; *Re Earl De la Warr's Estates* (1881) 16 ChD 587; *Stott v Milne* (1884) 25 ChD 710, CA; *Re Weall*, *Andrews v Weall* (1889) 42 ChD 674 at 680-681. As to expenses of the Public Trustee see PARAS 790-791 post.

7 *Poole v Pass* (1839) 1 Beav 600 at 604-605.

8 *Re -- (a lunatic)* (1860) 8 WR 333; *Re Marner's Trusts* (1866) LR 3 Eq 432; *Re Whitton's Trusts* (1869) LR 8 Eq 352; *Re Smith's Trusts* (1870) LR 9 Eq 374; *Re Evans' Trusts* (1872) 7 Ch App 609; *Re T--* (1880) 15 ChD 78 at 79. The costs of a petition for payment of income presented in an administration action have been held payable in some cases out of capital (*Scrivener v Smith* (1869) LR 8 Eq 310; *Lonquet v Hockley* (1870) 22 LT 198), and in one case out of income (*Eady v Watson* (1864) 12 WR 682).

9 *Re Elmore's Will Trusts* (1860) 9 WR 66 at 67; *Re Turnley* (1866) 1 Ch App 152; *Re Whitton's Trusts* (1869) LR 8 Eq 352; *Re Earl of Berkeley's Will, Re Gloucester and Berkeley Canal Act 1870* (1874) 10 Ch App 56; *Re Leslie's Settlement Trusts* (1876) 2 ChD 185 at 190; *Stott v Milne* (1884) 25 ChD 710, CA; *More v More* (1889) 37 WR 414; *Hamilton v Tighe* [1898] 1 IR 123. Where proceedings are designed to define and secure the personal rights of the trustees as individuals, the general rule that trustees are entitled to their costs on an indemnity basis does not apply: *Re Dargie, Miller v Thornton-Jones* [1954] Ch 16, [1953] 2 All ER 577. Cf *Poole v Pass* (1839) 1 Beav 600. For the rights of trustees as to costs generally see PARA 906 et seq post.

10 See PARA 818 post.

11 The costs may in an exceptional case be charged on income: *Equitable Reversionary Interest Society v Fuller* (1861) 1 John & H 379 at 383.

12 *Faulkner v Daniel* (1843) 3 Hare 199 at 217; *Burrell v Earl of Egremont* (1844) 7 Beav 205; *Pitt v Pitt* (1856) 22 Beav 294; *Allhusen v Whittell* (1867) LR 4 Eq 295; *Tewart v Lawson* (1874) LR 18 Eq 490; *Norton v Johnstone* (1885) 30 ChD 649. The tendency of the court to fix capital charges on capital is further illustrated by *Re Brandon, Samuels v Brandon* (1932) 49 TLR 48, where the incumbrancer had prevented the payment of the incumbrance by the special method (in fact, accumulation of income) directed by the testator, and it was held, applying *Tewart v Lawson* supra and *Norton v Johnstone* supra, that the testator's direction did not entitle the persons who would have benefited by the direction, had it been effective, to be recouped for the money expended out of capital.

13 *Todd v Moorhouse* (1874) LR 19 Eq 69.

14 *Bosanquet v Allen, Carver v Duncan* [1985] AC 1082 at 1120, [1985] 2 All ER 645 at 652, HL, per Lord Templeman (where doubt was expressed as to whether premiums on gift protection policies are properly classifiable as expenses; the alternative would be to treat them as distributions). See also *Macdonald v Irvine* (1878) 8 ChD 101, CA; *Re Morley, Morley v Haig* [1895] 2 Ch 738; *Re Sherry, Sherry v Sherry* [1913] 2 Ch 508; cf *Re Waugh's Trusts* (1877) 25 WR 555.

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## **(6) TERMINATION OF THE TRUST**

### **749. Transfer of trust property.**

When a trust has terminated, the persons who have become absolutely entitled to the trust property may require the trustee to transfer it to them at their expense<sup>1</sup>, on furnishing to him clear proof that his duties and responsibilities are at an end<sup>2</sup>.

1 *Taylor v Glanville* (1818) 3 Madd 176; *Knight v Martin* (1829) 1 Russ & M 70; *Willis v Hiscox* (1839) 4 My & Cr 197; *Poole v Pass* (1839) 1 Beav 600; *Saunders v Vautier* (1841) Cr & Ph 240; *Holford v Phipps* (1841) 3 Beav 434; *Re Knight's Trusts* (1859) 27 Beav 45. As to the effect of a provision empowering trustees to pay a beneficiary before he attains the age of majority see *Re Somech, Westminster Bank Ltd v Phillips* [1957] Ch 165, [1956] 3 All ER 523; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 40.

2 *Holford v Phipps* (1841) 3 Beav 434 at 440-441 per Lord Langdale MR; *Warter v Anderson* (1853) 11 Hare 301 at 303 per Wood V-C. If, in spite of adequate proof, the trustee refuses to make the transfer, he is liable to be ordered to pay the costs of any proceedings rendered necessary thereby: *Jones v Lewis* (1786) 1 Cox Eq Cas 199; *Willis v Hiscox* (1839) 4 My & Cr 197; *Thorby v Yeats* (1842) 1 Y & C Ch Cas 438; *Re Cater's Trusts (No 2)* (1858) 25 Beav 366 at 367. The fact of his having acted under the advice of counsel is not an absolute protection to him in such a case: *Devey v Thornton* (1851) 9 Hare 222 at 232 per Turner V-C. If there are very special circumstances, the court may decline to order the transfer of the trust property: *Re Sandeman's Will Trusts, Sandeman v Hayne* [1937] 1 All ER 368 at 373. As to the trustee's duty to hand over the trust property to the right persons see PARA 956 post; and as to the trustee's duty to act impartially between beneficiaries see PARA 951 post.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(6) TERMINATION OF THE TRUST/750. Termination of trusts by beneficiaries.

## 750. Termination of trusts by beneficiaries.

Where all the actual or possible beneficiaries are in existence and sui juris<sup>1</sup>, they may together put an end to the trust in whole or in part or discharge a trustee from it<sup>2</sup>. This right exists notwithstanding an intervening discretionary trust, if the sole objects of that trust are sui juris and concur<sup>3</sup>. Again, where there is a gift of an annuity, the annuitant is entitled to demand in lieu payment of the cash which would be needed to purchase it<sup>4</sup>. The beneficiaries cannot, however, at one and the same time override the pre-existing trusts and keep them in existence<sup>5</sup>. The beneficiary must be entitled to require the trustee to assign to him the subject matter of the trust. If the trust cannot be determined because the trustee has outstanding obligations and has no power to transfer the trust asset to the beneficiary or his order, the rule does not apply<sup>6</sup>. A trustee cannot by an act of his own, without communication with his beneficiary, divest himself of the character of trustee until he has performed his trust<sup>7</sup>.

The general principle applies in the same way where the beneficiary is a charity, whether corporate or incorporate<sup>8</sup>, but not where the alleged beneficiary is 'charity' in the abstract, there being provisions for the future ascertainment of particular charitable institutions<sup>9</sup>. Although an indefinite gift of income to an individual carries the right to corpus<sup>10</sup>, this is not so in the case of a similar gift to charity, since such a gift could be enjoyed by the charity to its fullest extent in perpetuity<sup>11</sup>.

1 The principle has been held to apply not only to joint tenants and tenants in common but also to the certificate holders under a unit trust (*Re AEG Unit Trust (Managers) Ltd's Deed, Midland Bank Executor and Trustee Co Ltd v AEG Unit Trust (Managers) Ltd* [1957] Ch 415 at 422, [1957] 2 All ER 506 at 509 per Wynn-Parry J) and cases where the beneficiaries are entitled in succession (*Anson v Potter* (1879) 13 ChD 141; *Re White, White v Edmond* [1901] 1 Ch 570). As to the possibility of child-bearing preventing effective direction being given by the beneficiaries to the trustees cf *Re Whichelow, Bradshaw v Orpen* [1953] 2 All ER 1558, [1954] 1 WLR 5. See also *Figg v Clarke (Inspector of Taxes)* [1997] 1 WLR 603, [1997] STC 247, where the court refused to take account of incapacity to father future children in determining when beneficiaries became absolutely entitled.

2 *Wilkinson v Parry* (1828) 4 Russ 272 at 276 per Leach MR; *Saunders v Vautier* (1841) Cr & Ph 240; *King v Mullins* (1852) 1 Drew 308; *Gosling v Gosling* (1859) John 265; *Anson v Potter* (1879) 13 ChD 141; *Re Coleman, Henry v Strong* (1888) 39 ChD 443, CA; *Re Johnston, Mills v Johnston* [1894] 3 Ch 204; *Wharton v Masterman* [1895] AC 186, HL; *Re Bowden, Hulbert v Bowden* [1936] Ch 71; *IRC v Hamilton-Russell's Executors* [1943] 1 All ER 474, CA; *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 637, [1975] 1 WLR 882 at 889. See also PARA 736 note 3 ante. Where a trustee is called upon to part with the trust property on the ground that the beneficiary has put an end to the trust, he is entitled to clear evidence of the fact that the trust is at an end, including the production of any deed or document which has effected that result, and he is entitled to his costs of legal proceedings instituted to compel him to part with the trust property, where sufficient evidence of the termination of the trust has not been previously produced to him: *Holford v Phipps* (1841) 3 Beav 434. The existence of this power of terminating the trust may render valid a disposition which would otherwise transgress the rule against perpetuities: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1052. As to the time until which a trust for the sale of land is deemed to subsist for the protection of a purchaser see SETTLEMENTS vol 42 (Reissue) PARA 708. A trust for sale of land is now subsumed under a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 4, 5; and PARA 605 note 5 ante.

3 *Re Smith, Public Trustee v Aspinall* [1928] Ch 915.

4 *Re Robbins, Robbins v Legge* [1907] 2 Ch 8, CA; cf *Parkes v Royal Botanic Society of London* (1908) 24 TLR 508. As to the valuation of the annuity see *Re Castle, Nesbitt v Baugh* [1916] WN 195; *Westminster Bank Ltd v IRC* [1954] 1 All ER 240, [1954] 1 WLR 242; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 801.

5 *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 637, [1975] 1 WLR 882 at 889 per Walton J. See also *Re Brockbank, Ward v Bates* [1948] Ch 206 at 209, [1948] 1 All ER 287 at 288, where Vaisey J refused to direct the transfer of the trust fund to trustees of the beneficiaries' choice; the beneficiaries must either keep the trusts of the will on foot or by mutual agreement extinguish and put an end to the trusts. Beneficiaries do now have the power to require the retirement and appointment of trustees under the Trusts of Land and Appointment of Trustees Act 1996 s 19 (see PARA 897 post).

6 *Don King Productions Inc v Warren* [1998] 2 All ER 608 at 634, [1999] 3 WLR 276 at 303-304 per Lightman J; affd [2000] Ch 291, [1999] 2 All ER 218, CA.

7 *Chalmer v Bradley* (1819) 1 Jac & W 51 at 68 per Plumer MR. If, however, a beneficiary sui juris and absolutely entitled (or two or more beneficiaries together so entitled) refused to accept a transfer of the trust funds, the trustees would be entitled, if they wished, to pay them into court: *IRC v Hamilton-Russell's Executors* [1943] 1 All ER 474, CA.

8 *Wharton v Masterman* [1895] AC 186, HL.

9 *Re Jefferies, Finch v Martin* [1936] 2 All ER 626.

10 *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] Ch 346, [1960] 1 All ER 42, CA.

11 *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for the Relief of the Jewish Poor* [1960] Ch 346, [1960] 1 All ER 42, CA. See also *Re Beesty's Will Trusts, Farrar v Royal Alfred Merchant Seamen's Society* [1966] Ch 223, [1964] 3 All ER 82 (terms of the gift were held not to be limited to income only).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(6) TERMINATION OF THE TRUST/751. Termination of discretionary trusts by objects of trusts.

### **751. Termination of discretionary trusts by objects of trusts.**

Where two or more persons together are the sole objects of a discretionary trust and between them are entitled to have the whole fund applied for their benefit, they are to be treated as if they together formed one person and accordingly are entitled to have the fund or its income, as the case may be, handed over to them<sup>1</sup>.

<sup>1</sup> *Re Nelson, Norris v Nelson* [1928] Ch 920n, CA; *Re Smith, Public Trustee v Aspinall* [1928] Ch 915; cf *Re Daw, Binney v Daw* (1917) 87 LJ Ch 441; *Re WDJ* [1934] Ch 174 at 182, CA; *Re Beckett's Settlement, Re Beckett, Eden v Von Stutterheim* [1940] Ch 279. See also *Re Chance's Settlement Trusts, Chance v Billing* (1918) 62 Sol Jo 349; *Thorn v IRC* [1976] 2 All ER 622 at 631, [1976] 1 WLR 915 at 921-922.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(6) TERMINATION OF THE TRUST/752. Partial termination of trusts by one of two or more beneficiaries.

## **752. Partial termination of trusts by one of two or more beneficiaries.**

One of several beneficiaries, being sui juris and absolutely and indefeasibly entitled in possession to a share in the trust property, can generally require a transfer of that share to him<sup>1</sup>. So far as personalty is concerned, the rule will normally be applied, even though the undistributed shares may as a result lose value; but in very special circumstances, where it would unduly prejudice the other beneficiaries, such a beneficiary may be unable to insist on a transfer<sup>2</sup>. Where, however, real estate<sup>3</sup> was devised on trust for sale and to divide the proceeds between A, B, C and D, A has no right to require the transfer to him of his undivided share of the real estate since to allow that undivided share to be so taken by A would be detrimental to the other beneficiaries<sup>4</sup>. It is thought that this principle would be equally applicable to a trust of land under the Trusts of Land and Appointment of Trustees Act 1996<sup>5</sup>.

1 *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192 at 199, CA; *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 637, [1975] 1 WLR 882 at 889 per Walton J; *Crowe v Appleby (Inspector of Taxes)* [1975] 3 All ER 529, [1975] 1 WLR 1539 (affd without reference to this point [1976] 2 All ER 914, [1976] 1 WLR 885, CA).

2 *Re Sandeman's Will Trusts, Sandeman v Hayne* [1937] 1 All ER 368; *Re Weiner's Will Trusts, Wyner v Braithwaite* [1956] 2 All ER 482, [1956] 1 WLR 579; *Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625 at 637, [1975] 1 WLR 882 at 889 per Walton J. See also *Lloyds Bank plc v Duker* [1987] 3 All ER 193, [1987] 1 WLR 1324, where the court refused to order a transfer of private company shares because it would have adversely affected the other beneficiaries.

3 The principle may also apply to a case of a mortgage debt which cannot be conveniently split into shares: see *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192 at 199, CA.

4 *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192 at 199, CA; *Re Horsnaill, Womersley v Horsnaill* [1909] 1 Ch 631; *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62, CA. Quaere whether in a suitable case an appropriation could be required: see *Re Weiner's Will Trusts, Wyner v Braithwaite* [1956] 2 All ER 482 at 484-485, [1956] 1 WLR 579 at 582-583 per Harman J. A trust for sale of land is now subsumed under a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 4, 5; and PARA 605 note 5 ante.

5 An application could be made to the court under *ibid* s 14: see REAL PROPERTY vol 39(2) (Reissue) PARA 67. See also the power to partition under s 7 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 223.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/1. NATURE AND CREATION OF TRUSTS/(6) TERMINATION OF THE TRUST/753. Record of termination.

### **753. Record of termination.**

A trustee should preserve a record of the termination of the trust, in order to preclude the possibility of a question being subsequently raised as to whether it has in fact taken place<sup>1</sup>.

<sup>1</sup> *Payne v Evens* (1874) LR 18 Eq 356 at 367. As to the right of a trustee to a release on the termination of a trust see PARA 925 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(i) In general/754. Different kinds of trustees.

## **2. TRUSTEES**

### **(1) KINDS OF TRUSTEES**

#### **(i) In general**

#### **754. Different kinds of trustees.**

Individuals may be trustees, as may corporate bodies if they have by their constitution power so to act<sup>1</sup>. Special kinds of trustees include: trustees in bankruptcy<sup>2</sup>; trustees for the purposes of the Settled Land Act 1925<sup>3</sup> and tenants for life and statutory owners in whom settled land is vested<sup>4</sup>; and trustees of land<sup>5</sup>. In a different category are included judicial trustees<sup>6</sup> and the Public Trustee<sup>7</sup>. The Public Trustee or other body corporate empowered to undertake trusts may be appointed custodian trustee with functions limited to custody of the trust property and documents while other trustees manage the property<sup>8</sup>. Public bodies may become trustees as a result of an enactment<sup>9</sup>. In a loose sense a legal personal representative is, owing to his fiduciary duties, a trustee for the creditors and beneficiaries claiming under the deceased while he is acting as personal representative and before he has completed his functions as such and become a trustee in the strict sense<sup>10</sup>. Moreover, a person who has contracted to sell real property to a purchaser is in a sense a trustee of it for the purchaser<sup>11</sup>.

A person who, not being a trustee and without authority, intermeddles in trust matters makes himself a constructive trustee or trustee de son tort<sup>12</sup>.

1 As to who may be trustees see PARA 609 ante. As to the special powers of trust corporations and their remuneration see PARA 799 et seq post. For the meaning of 'trust corporation' see PARA 798 post.

2 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316 et seq.

3 See SETTLEMENTS vol 42 (Reissue) PARA 750 et seq. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

4 See SETTLEMENTS vol 42 (Reissue) PARAS 609, 688 et seq. See also note 3 supra.

5 See SETTLEMENTS vol 42 (Reissue) PARA 900 et seq. For the meaning of 'trustees of land' see PARA 724 note 7 ante.

6 See PARA 757 et seq post.

7 See PARA 766 et seq post.

8 As to custodian trustees see PARA 792 et seq post.

9 See eg the Solicitors Act 1974 s 35, Sch 1 Pt 2 para 6 (as amended); and LEGAL PROFESSIONS vol 66 (2009) PARA 892. As to the nature of the trustee's limited obligations under trusts imposed by statute in the context of the exercise of a public function see *Re Ahmed & Co (a firm)* [2006] EWHC 480 (Ch), [2006] All ER (D) 195 (Mar); and see PARA 624 note 1 ante.

10 See PARA 602 ante.

11 As to this relationship see PARA 620 ante.

12 As to constructive trustees and trustees de son tort see PARA 687 et seq ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(i) In general/755. Meaning of 'bare trustee'.

### 755. Meaning of 'bare trustee'.

The meaning of 'bare trustee' varies according to context<sup>1</sup>. A bare trustee has been defined as a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so<sup>2</sup>. 'Bare trustee' has been given an extended meaning in certain tax statutes<sup>3</sup>.

1 *Christie v Ovington* (1875) 1 ChD 279; *Morgan v Swansea Urban Sanitary Authority* (1878) 9 ChD 582.

2 *Christie v Ovington* (1875) 1 ChD 279; *Morgan v Swansea Urban Sanitary Authority* (1878) 9 ChD 582; *Re Docwra, Docwra v Faith* (1885) 29 ChD 693; *Re Cunningham and Frayling* [1891] 2 Ch 567 at 571-572 per Stirling J; *Re Blandy Jenkins' Estate, Blandy Jenkins v Walker* [1917] 1 Ch 46 (where the earlier authorities were reviewed); *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79, DC. A bare trustee may originally have had duties in respect of the property which have since ceased (*Christie v Ovington* supra at 281 per Hall V-C) or which have been superseded by a request from the persons entitled to the property to convey it to them (*Morgan v Swansea Urban Sanitary Authority* supra at 585 per Jessel MR). A person who has himself an existing beneficial interest of any kind in the trust property is in no circumstances a bare trustee of it: *Lysaght v Edwards* (1876) 2 ChD 499 at 506 per Jessel MR. Trustees for sale, after selling the property under a court order to a purchaser who has paid the purchase money into court, are bare trustees of it notwithstanding that they have a beneficial interest in the proceeds of sale, since their beneficial interest in the property itself has ceased and they have no duty to perform in respect of it except to convey it to the purchaser: *Re Docwra, Docwra v Faith* supra. As to bare trustees and breach of trust see PARA 1087 post.

3 See eg the Income and Corporation Taxes Act 1988 s 752C(7) (as added) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1319); and the Taxation of Chargeable Gains Act 1992 s 60(1) (as amended) (see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 112).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(i) In general/756. Limited power of bare trustee.

### **756. Limited power of bare trustee.**

Without the beneficiary's agreement a bare trustee may not settle an account on behalf of the beneficiary<sup>1</sup> and may not present a bankruptcy petition against a person who owes a debt to him as a bare trustee<sup>2</sup>.

It may well be that if a fiduciary, such as a solicitor to a trust, seeks to retain a profit made by virtue of his fiduciary position, he will need to prove that he had the informed consent of the beneficiaries under the bare trust, and that the consent of the bare trustees will be insufficient<sup>3</sup>.

1 *Fell v Lutwidge* (1740) Barn Ch 319 at 321 per Lord Hardwicke LC.

2 *Re Adams, ex p Culley* (1878) 9 ChD 307, CA; *Re Hastings, ex p Dearle* (1884) 14 QBD 184, CA; cf *Re Steel Wing Co Ltd* [1921] 1 Ch 349.

3 *Boardman v Phipps* [1967] 2 AC 46 at 104, [1966] 3 All ER 721 at 744, HL, per Lord Cohen.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/A. IN GENERAL/757. Jurisdiction with regard to judicial trustees.

## **(ii) Judicial Trustees**

### **A. IN GENERAL**

#### **757. Jurisdiction with regard to judicial trustees.**

The Chancery Division of the High Court<sup>1</sup> exercises jurisdiction under the statutory provisions<sup>2</sup> and rules<sup>3</sup> relating to judicial trustees<sup>4</sup>.

1 See the Supreme Court Act 1981 s 61(1), Sch 1 para 1(c); and PARA 632 ante. See also PARA 643 ante. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

2 Ie the Judicial Trustees Act 1896.

3 Ie the Judicial Trustee Rules 1983, SI 1983/370: see PARA 758 et seq post.

4 See the Judicial Trustees Act 1896 s 2 (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II).

#### **UPDATE**

#### **757 Jurisdiction with regard to judicial trustees**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/A. IN GENERAL/758. Power to make rules.

## **758. Power to make rules.**

Rules may be made for carrying the Judicial Trustees Act 1896 into effect<sup>1</sup> and especially:

- 51 (1) for requiring judicial trustees, who are not officials of the court<sup>2</sup>, to give security for the due application of any trust property under their control<sup>3</sup>;
- 52 (2) respecting the safety of the trust property and the custody of it<sup>4</sup>;
- 53 (3) respecting the remuneration of judicial trustees and for fixing and regulating the fees to be taken so as to cover the expenses of the administration of the Judicial Trustees Act 1896 and respecting the payment of such remuneration and fees out of the trust property and, where the judicial trustee is an official of the court, respecting the application of the remuneration and fees payable to him<sup>5</sup>;
- 54 (4) for dispensing with formal proof of facts in proper cases<sup>6</sup>;
- 55 (5) for facilitating the discharge by the court of administrative duties under the Judicial Trustees Act 1896 without prejudicial proceedings and otherwise regulating procedure under that Act and making it simple and inexpensive<sup>7</sup>;
- 56 (6) for assigning jurisdiction under the Judicial Trustees Act 1896 to county court judges and defining such jurisdiction<sup>8</sup>;
- 57 (7) respecting the suspension or removal of any judicial trustee and the succession of another person to the office of any judicial trustee who may cease to hold office, and the vesting in that person of any trust property<sup>9</sup>;
- 58 (8) respecting the classes of trusts in which officials of the court are not to be judicial trustees or are to be so temporarily or conditionally<sup>10</sup>;
- 59 (9) respecting the procedure to be followed where the judicial trustee is executor or administrator<sup>11</sup>;
- 60 (10) for preventing the employment by judicial trustees of other persons at the expense of the trust, except in cases of strict necessity<sup>12</sup>;
- 61 (11) for the preparation, auditing (by the court or otherwise) and filing of the accounts of any trust of which a judicial trustee has been appointed<sup>13</sup>; and
- 62 (12) for the making of a report to the court on the accounts of any such trust<sup>14</sup>.

1 See the Judicial Trustees Act 1896 s 4(1). Rules under the Judicial Trustees Act 1896 may make different provision for different classes of trust, trustees, beneficiaries or trust property: s 4(1A) (added by the Administration of Justice Act 1982 s 57(3)). The rules may be made subject to the consent of the Treasury in matters relating to fees and to salaries and numbers of officers and to the consent of the authority for making orders under the Solicitors Act 1974 in matters relating to the remuneration of solicitors: see the Judicial Trustees Act 1896 s 4(2) (amended by the Statute Law (Repeals) Act 1986); and the Interpretation Act 1978 s 17(2)(a). The rules must be laid before each House of Parliament and are subject to annulment in pursuance of a resolution of either House within 40 days: see the Judicial Trustees Act 1896 s 4(2) (as so amended); the Statutory Instruments Act 1946 ss 4(3), 5(1), (2); and STATUTES vol 44(1) (Reissue) PARA 1516. As to the rules that have been made see the Judicial Trustee Rules 1983, SI 1983/370; and PARA 759 et seq post. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2 For the purposes of the Judicial Trustees Act 1896, 'official of the court' means the holder of such paid office in or connected with the court as may be prescribed by rules under that Act: s 5. For the purposes of the Judicial Trustee Rules 1983, SI 1983/370, 'official of the court' means the holder of any paid office in or connected with the Supreme Court and includes the Official Solicitor to the Supreme Court: r 2(1). As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

- 3 Judicial Trustees Act 1896 s 4(1)(1).
- 4 Ibid s 4(1)(2).
- 5 Ibid s 4(1)(3).
- 6 Ibid s 4(1)(4).
- 7 Ibid s 4(1)(5).
- 8 Ibid s 4(1)(6).
- 9 Ibid s 4(1)(7).
- 10 Ibid s 4(1)(8).
- 11 Ibid s 4(1)(9).
- 12 Ibid s 4(1)(10).
- 13 Ibid s 4(1)(11) (substituted by the Administration of Justice Act 1982 s 57(2)).
- 14 Judicial Trustees Act 1896 s 4(1)(12) (added by the Administration of Justice Act 1982 s 57(2)).

## **UPDATE**

### **758 Power to make rules**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/B. APPOINTMENT/759. Application for appointment.

## **B. APPOINTMENT**

### **759. Application for appointment.**

An application to the court for the appointment of a judicial trustee<sup>1</sup> is made using the Part 8 procedure or by an application in existing proceedings<sup>2</sup>.

An application for an injunction ancillary or incidental to an order appointing a judicial trustee may be joined with the application for such an order<sup>3</sup>. The court hearing such an application may grant an injunction restraining any trustee or person entitled to any interest in the property of which a judicial trustee is sought from assigning, charging or otherwise dealing with that property until after the hearing of a claim for the appointment of the judicial trustee and may require such claim returnable on such date as the court may direct, to be issued<sup>4</sup>.

The evidence in support of such an application must include an affidavit by the applicant containing the following particulars so far as the applicant can gain information with regard to them:

- 63 (1) a short description of the trust and instrument by which it is, or is to be, created<sup>5</sup>;
- 64 (2) short particulars of the trust property, with an approximate estimate of its income and capital value<sup>6</sup>;
- 65 (3) short particulars of the encumbrances, if any, affecting the trust property<sup>7</sup>;
- 66 (4) particulars as to the persons who are in possession of the documents relating to the trust<sup>8</sup>;
- 67 (5) the names and addresses of the beneficiaries and short particulars of their respective interests<sup>9</sup>; and
- 68 (6) the name, address and description of the proposed judicial trustee, if any, together with any proposal the applicant may make for his remuneration<sup>10</sup>.

Where the applicant cannot gain the information required on any point, he must mention his inability in the affidavit<sup>11</sup>.

1 For these purposes, 'judicial trustee' means a sole judicial trustee or two or more judicial trustees appointed to act together: Judicial Trustee Rules 1983, SI 1983/370, r 2(1).

2 See *ibid* r 3(1); and CPR Pt 8. See also PARA 643 ante. A claim may be issued out of a district registry for the purpose of an application to appoint a judicial trustee: see the Judicial Trustee Rules 1983, SI 1983/370, r 17(1).

Subject to any direction of the court, the claim must be served on every existing trustee who is not an applicant and on such of the beneficiaries as the applicant thinks fit; but a claim issued by or on behalf of a person creating or intending to create a trust need not be served on any person: see r 4(1). The court may give such directions as it thinks fit for the service of the claim or the dispensing with service of the claim on any person: see r 4(2). Where an applicant has no nomination for a judicial trustee, he may, if he thinks fit, give not less than four days' notice of the hearing of the application to any official of the court who may be appointed judicial trustee: see r 4(3). For the meaning of 'official of the court' see PARA 758 note 2 ante. Where an official of the court receives notice under r 4(3), he is not a party to the proceedings but he is entitled to attend the hearing: r 4(4).

3 *Ibid* r 3(2).

- 4 See *ibid* r 3(3).
- 5 *Ibid* r 3(4)(a).
- 6 *Ibid* r 3(4)(b).
- 7 *Ibid* r 3(4)(c).
- 8 *Ibid* r 3(4)(d).
- 9 *Ibid* r 3(4)(e).
- 10 *Ibid* r 3(4)(f).
- 11 *Ibid* r 3(5).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/B. APPOINTMENT/760. Appointment of judicial trustee.

## **760. Appointment of judicial trustee.**

Where application is made to the court<sup>1</sup> by or on behalf of the person creating or intending to create a trust<sup>2</sup> or by or on behalf of a trustee<sup>3</sup> or beneficiary<sup>4</sup>, the court may in its discretion appoint a person (a 'judicial trustee') to be a trustee of that trust either jointly with any other person or as sole trustee and, if sufficient cause is shown, in place of all or any existing trustees<sup>5</sup>. Any fit and proper person nominated in the application may be appointed a judicial trustee and, in the absence of such nomination or if the court is not satisfied of the fitness of a person so nominated, an official of the court<sup>6</sup> may be appointed, and in any case a judicial trustee is subject to the control and supervision of the court as an officer of the court<sup>7</sup>.

An official of the court may not be appointed or act as judicial trustee:

- 69 (1) for any persons in their capacity as members or debenture holders of or being in any other relation to, any corporation or unincorporated body, or any club<sup>8</sup>; or
- 70 (2) of a trust which involves the carrying on of any trade or business, unless the court, with or without special conditions to ensure the proper supervision of the trade or business, specifically directs<sup>9</sup>.

The appointment of an official of the court as a judicial trustee is an appointment of the holder of that office for the time being, and no further order or appointment is necessary by reason only of the person appointed dying or ceasing to hold office<sup>10</sup>. Any property vested in an official of the court as a judicial trustee vests, on his dying or ceasing to hold office, in the person appointed to succeed him without any conveyance, assignment or transfer<sup>11</sup>.

The court may give such directions as it thinks fit as to the manner in which and the conditions subject to which:

- 71 (a) the trust fund is to be held<sup>12</sup>;
- 72 (b) any title deeds, certificates or other documents which are evidence of the title to the trust property are to be held or disposed of<sup>13</sup>;
- 73 (c) trust property may be vested in the judicial trustee<sup>14</sup>; and
- 74 (d) any payments received or made on behalf of the trust are to be dealt with and accounts of it are to be kept<sup>15</sup>.

Where an application relating to the estate of a deceased person is made to the court under the above provisions, the court may, if it thinks fit, proceed as if the application were, or included, an application under its statutory power<sup>16</sup> to appoint a substitute for, or to remove, a personal representative<sup>17</sup>.

1 See PARA 757 ante.

2 'Trust' has its ordinary meaning and includes a trust the trustees of which are trustees for the purposes of the Settled Land Act 1925: *Re Marshall's Will Trusts* [1945] Ch 217, [1945] 1 All ER 550. The Judicial Trustees Act 1896 does not extend to a charity: s 6(2) (amended by the Charities Act 1960 s 48(2), Sch 7 Pt I). The administration of the property of a deceased person, whether a testator or intestate, is a trust, and the executor or administrator a trustee, within the meaning of the Judicial Trustees Act 1896: s 1(2). A person will not be

appointed judicial trustee of only a part of the trust property which is not subject to a separate trust: *Re Wells, Loggie v Wells* [1967] 3 All ER 908, [1968] 1 WLR 44.

3 See *Re Ratcliff* [1898] 2 Ch 352 at 355-356 per Kekewich J (where it was said that the Judicial Trustees Act 1896 authorised the removal of an executor).

4 As to the making of the application see *Re Jones, Jones v Pickett* [1934] WN 77; and PARA 759 ante.

5 Judicial Trustees Act 1896 s 1(1). The appointment is in the discretion of the court and will not be made where there is good reason to the contrary: *Re Chisholm, Legal Reversionary Society v Knight* (1898) 43 Sol Jo 43; *Re Ratcliff* [1898] 2 Ch 352 (application refused and an ordinary trustee appointed); *Re Martin* [1900] WN 129 (where Kekewich J considered the union of a judicial trustee and a private or gratuitous trustee undesirable and appointed an ordinary trustee). A judicial trustee was appointed where the action would not be heard for some time and it would be unfair to leave the administration of the funds to trustees whose honesty was in doubt: *McDonald v Horn* (1993) Times, 12 October; affd without comment on the appointment [1995] 1 All ER 961, CA.

A copy of the order appointing a judicial trustee must be served by the party having conduct of the proceedings on the judicial trustee, such beneficiaries, former trustees and other persons as the court may direct: Judicial Trustee Rules 1983, SI 1983/370, r 5.

Where a judicial trustee is appointed on a claim or application or in a cause or matter proceeding in a district registry, all proceedings with respect to the trust and the administration of it under the Judicial Trustees Act 1896 or the Judicial Trustee Rules 1983, SI 1983/370, must be taken in the district registry (r 17(2)); but the court may transfer any trust of which there is a judicial trustee from a district registry to chancery chambers or from chancery chambers to a district registry, or from one district registry to another, according as it appears convenient for the administration of the trust (r 17(3)).

6 For the meaning of 'official of the court' see PARA 758 note 2 ante.

7 Judicial Trustees Act 1896 s 1(3).

8 Judicial Trustee Rules 1983, SI 1983/370, r 15(a).

9 Ibid r 15(b).

10 Ibid r 16(1).

11 Ibid r 16(2).

12 Ibid r 7(a).

13 Ibid r 7(b).

14 Ibid r 7(c).

15 Ibid r 7(d).

16 le under the Administration of Justice Act 1985 s 50: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 706.

17 Judicial Trustees Act 1896 s 1(7) (added by the Administration of Justice Act 1985 ss 50(6), 69(5), Sch 9 para 10).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/B. APPOINTMENT/761. Security.

## **761. Security.**

Where the judicial trustee is not an official of the court<sup>1</sup>, an order appointing a judicial trustee may include such directions as the court<sup>2</sup> thinks fit for the giving of security by the person appointed<sup>3</sup>. Except for special reasons, the court may not, however, require security to be given when the application is made by a person creating or intending to create a trust<sup>4</sup>. Where a person is required to give security in accordance with these provisions<sup>5</sup>, he must give security approved by the court duly to account for what he receives as judicial trustee and to deal with it as the court directs<sup>6</sup>. Unless the court otherwise directs, the security must be by guarantee<sup>7</sup>. Any guarantee or undertaking ordered to be filed as security must be filed in chancery chambers or, if the cause or matter is proceeding in a district registry, in that registry<sup>8</sup>.

1 Judicial Trustee Rules 1983, SI 1983/370, r 6(1). For the meaning of 'official of the court' see PARA 758 note 2 ante.

2 See PARA 757 ante.

3 Judicial Trustee Rules 1983, SI 1983/370, r 6(2). Rule 6(2) is subject to r 6(3) (see the text and note 4 infra): r 6(2).

4 Ibid r 6(3).

5 Ie by virtue of ibid r 6(2): see the text and note 3 supra.

6 Ibid r 6(4).

7 Ibid r 6(5).

8 Ibid r 6(6). As to proceedings in a district registry see PARAS 759 note 2, 760 note 5 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/C. ADMINISTRATION AND ACCOUNTS/762. In general.

### **C. ADMINISTRATION AND ACCOUNTS**

#### **762. In general.**

The court<sup>1</sup>, either on or without request, may give to a judicial trustee any general or special directions in regard to the trust or its administration<sup>2</sup>. A judicial trustee or any person interested in the trust may at any time request the court to give directions as to the trust or its administration, including a direction that there is to cease to be a judicial trustee<sup>3</sup>. The court may require the trustee or any other person to attend at chambers (if it appears that such attendance is necessary or convenient) or may direct a claim to be issued in the proceedings, or direct an issue or issues to be tried<sup>4</sup>.

Unless the court otherwise orders, a judicial trustee must make up his accounts (in such form as the court requires) in each year to the anniversary of his appointment, and must deliver them<sup>5</sup> within one calendar month after that anniversary<sup>6</sup>. A judicial trustee must indorse on his accounts a certificate of the approximate capital value of the trust property at the commencement of the year of account<sup>7</sup>.

There is provision as to fees payable in respect of any matter proceeding under the statutory rules<sup>8</sup>.

In any case where the court so directs, an inquiry into the administration by a judicial trustee of any trust or into any dealing or transaction of a judicial trustee is to be made in the prescribed manner<sup>9</sup>.

1 See PARA 757 ante.

2 Judicial Trustees Act 1896 s 1(4). The fact that the court may give the judicial trustee directions as to the trust or its administration does not deprive the judicial trustee of the power given to a trustee to compromise under the Trustee Act 1925 s 15(f) (see PARA 1052 head (6) post): *Re Ridsdel, Ridsdel v Rawlinson*[1947] Ch 597, [1947] 2 All ER 312.

3 Judicial Trustee Rules 1983, SI 1983/370, r 8(1). The request must state in writing the matters with regard to which directions are required: r 8(1).

4 See *ibid* r 8(2).

5 *Ibid* in accordance with *ibid* r 12 or r 13 (see PARA 763 post), as the case may be.

6 *Ibid* r 9.

7 *Ibid* r 10.

8 Where in any matter proceeding under the Judicial Trustee Rules 1983, SI 1983/370, a fee would be payable under the order for the time being in force relating to Supreme Court fees, that fee is to be paid: r 18. As to Supreme Court fees see the Civil Proceedings Fees Order 2004, SI 2004/3121 (as amended); and CIVIL PROCEDURE. As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

9 Judicial Trustees Act 1896 s 1(6) (amended by the Administration of Justice Act 1982 ss 57(1), 75, Sch 9 Pt I). For these purposes, 'prescribed' means prescribed by rules under the Judicial Trustees Act 1896: s 5. As to the power to make rules see PARA 758 ante. The Judicial Trustee Rules 1983, SI 1983/370, make no provision for the making of an inquiry under the Judicial Trustees Act 1896 s 1(6) (as amended). However, as to the filing,

examination and inspection of accounts see PARA 763 post; and as to default by a judicial trustee see PARA 765 post.

## **UPDATE**

### **762 In general**

NOTE 8--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see CIVIL PROCEDURE vol 11 (2009) PARA 87).

Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/C. ADMINISTRATION AND ACCOUNTS/763. Filing, examination and inspection of accounts.

### **763. Filing, examination and inspection of accounts.**

Different provisions relating to the filing, examination and inspection of the accounts of a judicial trustee apply depending upon whether that trustee is or is not a corporate trustee<sup>1</sup>.

Where the judicial trustee is not a corporate trustee<sup>2</sup>, then, unless the court<sup>3</sup> otherwise directs, he must submit his accounts to the court<sup>4</sup>. The accounts must be examined by the court unless it considers that they are likely to involve questions of difficulty and refers them to a qualified accountant<sup>5</sup> for report, in which case the court may order payment to him out of the trust of such reasonable amount in respect of his report as it thinks fit<sup>6</sup>. Following examination by or on behalf of the court, the result of the examination must be certified by a master<sup>7</sup> and an order may then be made as to the incidence of any costs or expenses incurred<sup>8</sup>. The judicial trustee must send a copy of the accounts, or, if the court thinks fit, a summary of the accounts, of the trust to such beneficiaries or other persons as the court may direct<sup>9</sup>. If an application is made by any person to inspect the filed accounts, the court may, if it thinks fit, having regard to the nature of the relation of the applicant to the trust, allow them to be inspected on giving reasonable notice<sup>10</sup>. Any person who is served with a copy or a summary of the accounts<sup>11</sup> or who, after inspection of the accounts<sup>12</sup>, remains dissatisfied with them, may apply to the court for directions<sup>13</sup>.

Where the judicial trustee is a corporate trustee<sup>14</sup>, the judicial trustee must submit for examination such accounts to such persons as the court may direct<sup>15</sup>. Any person to whom a judicial trustee is required to submit accounts may, on giving reasonable notice to the judicial trustee, inspect, either personally or by an agent, the books and other papers relating to the accounts<sup>16</sup>. Any person to whom the judicial trustee is required to submit accounts, or any beneficiary, who is dissatisfied with them may give notice specifying the item or items as to which objection is taken and requiring the judicial trustee within not less than 14 days to lodge his accounts with the court and a copy of such a notice must be lodged in chancery chambers or, if the cause or matter is proceeding in a district registry<sup>17</sup>, in that registry<sup>18</sup>. Following an examination by or on behalf of the court of an item or items in an account to which objection is taken, the result of the examination must be certified by a master and an order may thereupon be made as to the incidence of any costs or expenses incurred<sup>19</sup>.

1 For these purposes, 'corporate trustee' means the Official Solicitor to the Supreme Court, the Public Trustee (see PARA 766 et seq post) or a corporation either appointed by the court (see PARA 760 ante) in any particular case to be a trustee or entitled by rules made under the Public Trustee Act 1906 s 4(3) (see PARA 793 post) to act as custodian trustee: Judicial Trustee Rules 1983, SI 1983/370, r 2(1). As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

2 Judicial Trustee Rules 1983, SI 1983/370, r 12(1).

3 See PARA 757 ante.

4 Judicial Trustee Rules 1983, SI 1983/370, r 12(2).

5 For these purposes, 'qualified accountant' means a person who is a member of a firm all the partners in which are members of the Institute of Chartered Accountants in England and Wales or of the Association of Certified and Corporate Accountants: *ibid* r 2(1).

6 Ibid r 12(3). As to where an auditor has doubts about a payment of an authorised character see *Re Ridsdel, Ridsdel v Rawlinson* [1947] Ch 597 at 604, [1947] 2 All ER 312 at 316.

7 For these purposes, 'master' means a master of the Supreme Court other than a master of the Supreme Court (Taxing Office) and includes a district judge of a district registry of the High Court: Judicial Trustee Rules 1983, SI 1983/370, r 2(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74(1)(b), (3)). As to the renaming of the Supreme Court as the Senior Courts see note 1 ante.

8 Judicial Trustee Rules 1983, SI 1983/370, r 12(4).

9 Ibid r 12(5). As to copies of the accounts, and any alterations, comments or corrections on or to the accounts, being sent to the beneficiaries see *Re Ridsdel, Ridsdel v Rawlinson* [1947] Ch 597 at 606, [1947] 2 All ER 312 at 317.

10 Judicial Trustee Rules 1983, SI 1983/370, r 12(6).

11 Ie a summary of the accounts under ibid r 12(5): see the text and note 9 supra.

12 Ie after inspection of the accounts under ibid r 12(6): see the text and note 10 supra.

13 Ibid r 12(7).

14 Ibid r 13(1).

15 Ibid r 13(2).

16 Ibid r 13(3).

17 As to where the cause or matter is proceeding in a district registry see PARAS 759 note 2, 760 note 5 ante.

18 Judicial Trustee Rules 1983, SI 1983/370, r 13(4).

19 Ibid r 13(5).

## UPDATE

### 763 Filing, examination and inspection of accounts

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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## **764. Remuneration and disbursements.**

There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits<sup>1</sup>, as the court<sup>2</sup> may assign in each case, subject to any of the rules<sup>3</sup> respecting the application of the remuneration where the judicial trustee is an official of the court<sup>4</sup>. Save as the court may for special reasons otherwise order, the remuneration so assigned to any judicial trustee is to cover all his work and personal outlay<sup>5</sup>.

A person appointed judicial trustee must be allowed on the examination of his accounts:

- 75 (1) by way of remuneration, if any, such reasonable amount in respect of work reasonably performed as may be authorised by the court, and the court may direct that such remuneration is to be fixed by reference to such scales or rates of professional charges as it thinks fit provided that remuneration authorised under this provision<sup>6</sup> must not, in any year of account, exceed 15 per cent of the capital value of the trust property<sup>7</sup>; and
- 76 (2) such disbursements as have actually and properly been expended in his trusteeship<sup>8</sup>.

1 See the Judicial Trustee Rules 1983, SI 1983/370, r 11; and the text and notes 6-8 infra.

2 See PARA 757 ante.

3 In any rules under the Judicial Trustees Act 1896. As to the rules made see the Judicial Trustee Rules 1983, SI 1983/370.

4 Judicial Trustees Act 1896 s 1(5). For the meaning of 'official of the court' see PARA 758 note 2 ante.

5 Ibid s 1(5). As to a judicial trustee being allowed separate costs see *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 558, [1948] 2 All ER 318 at 366-367, CA.

6 In the under the Judicial Trustee Rules 1983, SI 1983/370, r 11: see the text and notes 7-8 infra.

7 Ibid r 11(1)(a). For these purposes, the capital value is to be ascertained from the certificate under r 10 (see PARA 762 ante) in respect of the year of account or, if the court sees fit in the case of a final account, from the certificate in respect of the preceding year: r 11(2)(a). The court may, if it thinks fit, indicate to a judicial trustee upon his appointment the scale or rate of professional charges that it considers would be appropriate in relation to the appointment: r 11(2)(b).

8 Ibid r 11(1)(b).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(ii) Judicial Trustees/C. ADMINISTRATION AND ACCOUNTS/765. Default by judicial trustee.

## **765. Default by judicial trustee.**

Where a judicial trustee fails to submit his account in the prescribed manner<sup>1</sup> or do any other thing which he is required to submit, provide or do, he and any or all of the beneficiaries and such other persons as the court<sup>2</sup> may direct may be required to attend in chambers to show cause for the failure and the court may, either in chambers or after adjourning into court, give such directions as it thinks proper, including, if necessary, directions for the discharge of the judicial trustee and the appointment of another and the payment of costs<sup>3</sup>.

Where the judicial trustee has failed to comply with the Judicial Trustees Act 1896 or with the rules made under it<sup>4</sup> or with any direction of the court made in accordance with those rules, or has otherwise misconducted himself in relation to the trust, the court may disallow any remuneration claimed in any subsequent account<sup>5</sup>.

If the court is satisfied that the judicial trustee has failed to pay any sum into the trust account within a reasonable period of time, it may charge him with interest at the rate currently payable in respect of judgment debts on that sum while in his possession<sup>6</sup>.

1 See PARA 763 ante.

2 See PARA 757 ante.

3 Judicial Trustee Rules 1983, SI 1983/370, r 14(1).

4 Ie the Judicial Trustee Rules 1983, SI 1983/370.

5 Ibid r 14(2).

6 Ibid r 14(3). As to the rate of interest on judgment debts see CIVIL PROCEDURE.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/A. APPOINTMENT, STATUS AND OFFICERS/766. Appointment and officers.

### **(iii) The Public Trustee**

#### **A. APPOINTMENT, STATUS AND OFFICERS**

##### **766. Appointment and officers.**

The Public Trustee is an officer who is appointed by the Lord Chancellor under the Public Trustee Act 1906<sup>1</sup>. He holds and must vacate office in accordance with the terms of his appointment<sup>2</sup>, and he must be paid such salary or fees as the Lord Chancellor determines with the consent of the Treasury<sup>3</sup>. If one person holds office both as the Public Trustee and as the Accountant General of the Supreme Court<sup>4</sup>, then, if he ceases to be the Accountant General, he also ceases to be the Public Trustee unless the Lord Chancellor otherwise directs<sup>5</sup>. If a vacancy occurs in the office of Public Trustee or the person appointed to hold office is for any reason unable to act for any period, such person as the Lord Chancellor appoints as deputy in that office performs, during the vacancy or that period, the functions of that office; and any property vested in the Public Trustee may accordingly be dealt with by the deputy in all respects as if it were vested in him instead<sup>6</sup>.

The Lord Chancellor must appoint such persons to be officers of the Public Trustee as, subject to the sanction of the Treasury, he may consider necessary for the purposes of the Public Trustee Act 1906; and those officers hold office upon such terms and are remunerated at such rates and in such manner as the Treasury may sanction<sup>7</sup>. Any person appointed to be Public Trustee or an officer of the Public Trustee may, and, if the Treasury so requires, must, be a person already in the public service<sup>8</sup>.

The salary or remuneration of the Public Trustee and his officers and such other expenses<sup>9</sup> of executing his office or otherwise carrying the Public Trustee Act 1906 into effect as may be sanctioned by the Treasury must be paid out of moneys provided by Parliament<sup>10</sup>.

The Central Office of the Public Trustee must be situated in London<sup>11</sup>. Branch offices may from time to time be established as may be prescribed by the Lord Chancellor by notice in the London Gazette<sup>12</sup>; and at any branch offices so established there must be Deputy Public Trustees who are officers of the Public Trustee and have the powers and perform the duties assigned<sup>13</sup> to them<sup>14</sup>.

1 See the Public Trustee Act 1906 ss 1(1), 8(1) (s 8(1) substituted by the Public Trustee and Administration of Funds Act 1986 s 1(3), Schedule para 1). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

The Public Trustee is subject to investigation by the Parliamentary Commissioner for Administration: see the Parliamentary Commissioner Act 1967 s 4(1), Sch 2 (as substituted); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 43.

The Public Trustee Act 1906 does not extend to Northern Ireland or Scotland: s 17(2). It would seem that expressions not expressly defined in the Act have the same meaning as in the Trustee Act 1925: see the Public Trustee Act 1906 s 15; and the Interpretation Act 1978 s 17(2)(a).

From 1 April 2001 the trust division of the Public Trust Office was merged with those parts of the office of the Official Solicitor to the Supreme Court which remained after the formation of the Children and Family Court Advisory and Support Service. Thus the offices of the Official Solicitor and the Public Trustee are now housed in



one office building, but they continue to have separate corporate functions even though one person may be appointed to hold both offices: see further MENTAL HEALTH vol 30(2) (Reissue) PARA 748.

2 Public Trustee Act 1906 s 8(1) (as substituted: see note 1 supra).

3 Ibid s 8(1A) (added by the Public Trustee and Administration of Funds Act 1986 s 1(3), Schedule para 1). As to the Public Trustee's salary and fees see PARAS 790-791 post. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

4 The office of Public Trustee and the office of Accountant General of the Supreme Court may be held by one person: Public Trustee and Administration of Funds Act 1986 s 1(1). As from a day to be appointed, the words 'Senior Courts' in the Public Trustee and Administration of Funds Act 1986 and the Public Trustee Act 1906 are substituted for the words 'Supreme Court' by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 4(1), (3). At the date at which this volume states the law no such day had been appointed. As to the Accountant General see CIVIL PROCEDURE vol 12 (2009) PARA 1549.

5 Public Trustee Act 1906 s 8(1B) (added by the Public Trustee and Administration of Funds Act 1986 Schedule para 1; prospectively amended (see note 4 supra)).

6 Public Trustee Act 1906 s 8(1C) (added by the Public Trustee and Administration of Funds Act 1986 Schedule para 1).

7 Public Trustee Act 1906 s 8(2).

8 Ibid s 8(3). Security must be given by such persons employed under the Public Trustee Act 1906 as the Treasury may direct for the due performance of their duties and for the due accounting for and payment of all moneys received by them in pursuance of that Act and the Public Trustee Rules 1912, SR & O 1912/348: r 5. The security must be for such sum and must be given in such manner and form as the Treasury orders in the case of each such person; and the Treasury may at any time require that the amount or nature of any such security be varied: r 5.

9 For these purposes, 'expenses' includes costs and charges: Public Trustee Act 1906 s 15.

10 Ibid s 8(5).

11 See ibid s 8(4); and the Public Trustee Rules 1912, SR & O 1912/348, r 3(1).

12 Ibid r 3(2). There are now no branch offices, the Manchester branch office having been closed in 1956.

Upon the appointment of the Public Trustee being completed, the Public Trustee must consider and determine whether the trust is to be administered from his central office or from a branch office and he must give directions accordingly; and any such directions may at any time be rescinded or varied by the Public Trustee at his discretion: r 11. For the purposes of the Public Trustee Act 1906, 'trust' includes an executorship or administratorship; and 'trustee' is to be construed accordingly: s 15. For the purposes of the Public Trustee Rules 1912, SR & O 1912/348 (as amended), the expression 'trust' includes any trust duty or office which the Public Trustee is authorised by the Public Trustee Act 1906 or the Public Trustee Rules 1912, SR & O 1912/348 (as amended) to accept; and the expression 'trustee' is to be construed accordingly: r 1. For the meaning of 'trust' generally see PARA 601 ante.

Upon the acceptance of any application under the Public Trustee Act 1906 s 3 (see PARA 772 et seq post), the Public Trustee must consider and determine whether the estate is to be administered from his central office or from a branch office and he must give directions accordingly; and any such directions may at any time be rescinded or varied by the Public Trustee at his discretion: Public Trustee Rules 1912, SR & O 1912/348, r 13(4).

13 Ie by or under the Public Trustee Rules 1912, SR & O 1912/348 (as amended).

14 Ibid r 4. The number of Deputy Public Trustees is such as the Lord Chancellor, with the sanction of the Treasury, may from time to time prescribe: r 4. Every such appointment must be notified in the London Gazette: r 4.

The Public Trustee may in writing authorise any Deputy Public Trustee to exercise and perform, either generally or in relation to any particular case and subject to such conditions and restrictions, if any, as the Public Trustee may impose, all or any of the powers and duties of the Public Trustee under rr 1-41 (as amended) except: (1) the power or duty of determining whether a trust or estate is to be administered from his central office or from a branch office; (2) the power of authorising officers of the Public Trustee to transfer securities or assure land or to sign cheques; and (3) the power of making advances for the purposes of any trust or estate: r 42(1). Any such authority, conditions or restrictions may at any time in like manner be withdrawn or varied by the Public Trustee at his discretion: r 42(2).

No Deputy Public Trustee and no firm or member of a firm of solicitors of which such Deputy is a member may, except with the consent in writing of the Public Trustee and subject to such conditions as he may impose, act as solicitor or solicitors to a trust or estate which is in course of administration by that Deputy: r 43.

For the purposes of the Public Trustee Act 1906 and the Public Trustee Rules 1912, SR & O 1912/348 (as amended), except r 30 (as amended) (see PARA 794 post), the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq); and any reference to a firm of solicitors is to be construed as including a reference to a recognised body: see the Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), (b), Sch 1.

## **UPDATE**

### **766 Appointment and officers**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 14--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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### **767. Scope of office.**

The Public Trustee is a corporation sole under that name with a perpetual succession and an official seal, and may sue and be sued under that name like any other corporation sole<sup>1</sup>, and may hold land<sup>2</sup>.

The Public Trustee is a trust corporation for certain statutory purposes<sup>3</sup>. He may, if he thinks fit<sup>4</sup>:

- 77 (1) act in the administration of estates of small value<sup>5</sup>;
- 78 (2) act as custodian trustee<sup>6</sup>;
- 79 (3) act as an ordinary trustee<sup>7</sup>; or
- 80 (4) be appointed to be a judicial trustee<sup>8</sup>.

The Public Trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed<sup>9</sup>. He cannot, however, accept any trust<sup>10</sup>:

- 81 (a) exclusively for religious or charitable purposes<sup>11</sup>; or
- 82 (b) which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under the Public Trustee Act 1906<sup>12</sup>; or
- 83 (c) under a deed of arrangement for the benefit of creditors<sup>13</sup>.

The Public Trustee must not accept the administration of an estate known or believed by him to be insolvent<sup>14</sup>, or the trusts of a settlement which has to be construed and governed by the law of any foreign country or any part of Her Majesty's dominions to which the Public Trustee Act 1906 does not apply<sup>15</sup>. The Public Trustee may act in the trusts of an English settlement even though it involves the management of property which is not situated in England or Wales<sup>16</sup>.

A notice affecting land which would have been authorised or required to be served on a person but for his death is sufficiently served before a grant of representation has been filed if: (i) it is addressed to 'The Personal Representatives of' the deceased and left at or sent by post to his last known place of residence or business in the United Kingdom<sup>17</sup>; and (ii) a copy of it, similarly addressed, is served on the Public Trustee<sup>18</sup>.

In so far as the Public Trustee does not already have power to do so, he may authorise an officer of his to exercise any function of his which is conferred by or under any enactment<sup>19</sup>. Anything done or omitted to be done by an officer so authorised in, or in connection with, the exercise or purported exercise of the function is treated for all purposes as done or omitted to be done by the Public Trustee in his capacity as such<sup>20</sup>.

1 Public Trustee Act 1906 s 1(2). Any instruments sealed by him are not, by reason of his using a seal, rendered liable to a higher stamp duty than if he were an individual: s 1(2). As to corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1111-1112.

2 *Re Leslie's Hassop Estates* [1911] 1 Ch 611.

3 As to trust corporations see PARA 798 et seq post.

4 Public Trustee Act 1906 s 2(1). This provision is subject to the provisions of the Public Trustee Act 1906 and rules made under it: see s 2(1). As to the rules made see the Public Trustee Rules 1912, SR & O 1912/348 (as amended). The Public Trustee may decline, either absolutely or except on the conditions prescribed for the time being by rules made under the Public Trustee Act 1906, to accept any trust, but he may not decline to accept any trust on the ground only of the small value of the trust property: s 2(3).

Since 2001 the Public Trustee has only accepted new cases in accordance with strict last resort acceptance criteria and in May 2006 the Lord Chancellor approved proposals for the Public Trustee to retire from the bulk of his existing caseload of trusts and estates: see the written ministerial statement issued by the Department for Constitutional Affairs *Official Solicitor and Public Trustee Trusts and Estate Cases* (23 May 2006). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

5 Public Trustee Act 1906 s 2(1)(a). As to the administration of small estates see PARA 772 et seq post.

6 Ibid s 2(1)(b). As to custodian trustees see PARA 792 et seq post.

7 Ibid s 2(1)(c). As to ordinary trusteeship see PARA 769 et seq post.

8 Ibid s 2(1)(d). As to judicial trustees see PARA 757 et seq ante.

9 See ibid s 2(2). The Public Trustee has all the same powers, duties and liabilities, and is entitled to the same rights and immunities and is subject to the control and orders of the court, as a private trustee acting in the same capacity: s 2(2). This provision is subject to the Public Trustee Act 1906 and the rules made thereunder: s 2(2). For these purposes, 'court' means the High Court and, as respects trusts within its jurisdiction (see PARAS 641-642 ante), the county court: s 15.

10 For the meaning of 'trust' see PARA 766 note 12 ante.

11 Public Trustee Act 1906 s 2(5). See also *Re Cherry's Trusts*, *Robinson v Wesleyan Methodist Chapel Purposes Trustees* [1914] 1 Ch 83; *Re Hampton, Public Trustee v Hampton* (1918) 88 LJ Ch 103 (where a devise to the Public Trustee upon trust for sale, and to hold the net proceeds of sale in trust for such charitable objects as he might select, was held to be a trust exclusively for charitable purposes); and CHARITIES vol 8 (2010) PARA 258. Nothing in the Public Trustee Act 1906 or the rules made under it abridges or affects the powers or duties of the official trustee of charity lands or official trustees of charitable funds: see s 2(5).

12 See ibid s 2(4). If he thinks fit, the Public Trustee may act as custodian trustee of a trust which involves the management or carrying on of any business, but upon the conditions that: (1) he is not to act in the management or carrying on of such business; and (2) he is not to hold any property of such a nature as will expose the holder of it to any liability except under exceptional circumstances and when he is satisfied that he is fully indemnified or secured against loss: Public Trustee Rules 1912, SR & O 1912/348, r 7(1).

The Public Trustee may if he thinks fit accept as ordinary trustee, under exceptional circumstances, a trust which involves the management or carrying on of any business, but upon the conditions that, except with the consent of the Treasury, he may only carry on the same: (a) for a short time not exceeding 18 months; and (b) with a view to sale, disposition or winding up; and (c) if satisfied that the same can be carried on without risk of loss: r 7(2). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

13 Public Trustee Act 1906 s 2(4).

14 Ibid s 2(4).

15 *Re Hewitt's Settlement*, *Hewitt v Hewitt* [1915] 1 Ch 228.

16 *Re Hewitt's Settlement*, *Hewitt v Hewitt* [1915] 1 Ch 228 at 234 per Eve J. As from a day to be appointed, the Public Trustee may exercise the functions of a deputy appointed by the Court of Protection: see the Public Trustee and Administration of Funds Act 1986 s 3(1) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 33(a)). This provision is subject to the Public Trustee and Administration of Funds Act 1986 s 3(6); and PARAS 788, 790 post. See MENTAL HEALTH vol 30(2) (Reissue) PARA 757. As the date at which this volume states the law no such day had been appointed.

17 See the Law of Property (Miscellaneous Provisions) Act 1994 s 18(1)(a); and SALE OF LAND vol 42 (Reissue) PARA 322. Where it is not expressly defined by an Act, 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. For the purposes of the Trustee Act 1925, 'United Kingdom' is similarly defined: see the Trustee Act 1925 s 68(1) PARA (20). 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

18 See the Law of Property (Miscellaneous Provisions) Act 1994 s 18(1)(b); and SALE OF LAND vol 42 (Reissue) PARA 322. As to the filing of documents so served, the keeping of a register of details taken from them, and searches of the register, see the Public Trustee (Notices Affecting Land) (Title on Death) Regulations 1995, SI 1995/1330 (amended by SI 2001/3902).

19 Deregulation and Contracting Out Act 1994 s 74(1), (4)(d). As to the contracting out of the function of office-holders generally see s 69; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 364.

20 Ibid s 74(2), (4)(d). Section 74(2) does not, however, apply for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done as mentioned in that provision: s 74(3).

## **UPDATE**

### **767 Scope of office**

NOTE 16--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/A. APPOINTMENT, STATUS AND OFFICERS/768. Power to make rules.

## **768. Power to make rules.**

The Lord Chancellor must, with the concurrence of the Treasury, make rules for carrying into effect the objects of the Public Trustee Act 1906 and in particular for all or any of the following purposes<sup>1</sup>:

- 84 (1) establishing the office of Public Trustee and prescribing the trusts or duties he is authorised to accept or undertake, and the security, if any, to be given by the Public Trustee and his officers<sup>2</sup>;
- 85 (2) the transfer to and from the Public Trustee of any property<sup>3</sup>;
- 86 (3) the accounts to be kept and an audit thereof<sup>4</sup>;
- 87 (4) the establishment and regulations of any branch office<sup>5</sup>;
- 88 (5) excluding any trusts from the operation of the Public Trustee Act 1906 or any part of it<sup>6</sup>;
- 89 (6) the classes of corporate bodies entitled to act as custodian trustees<sup>7</sup>; and
- 90 (7) the form and manner in which notices under the Public Trustee Act 1906 are to be given<sup>8</sup>.

1 Public Trustee Act 1906 s 14(1). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517. Every rule must be laid before each House of Parliament and is subject to annulment in pursuance of a resolution of either House within 40 days: see s 14(2); the Statutory Instruments Act 1946 ss 4(3), 5(1), (2); and STATUTES vol 44(1) (Reissue) PARA 1516. As to the rules that have been made see the Public Trustee Rules 1912, SR & O 1912/348 (as amended).

The Public Trustee may frame and cause to be printed and circulated or otherwise promulgated such forms and directions and regulations as he may deem requisite or expedient for facilitating proceedings under the Public Trustee Act 1906 and rules made thereunder: Public Trustee Rules 1912, SR & O 1912/348, r 44.

2 Public Trustee Act 1906 s 14(1)(a).

3 Ibid s 14(1)(b).

4 Ibid s 14(1)(c).

5 Ibid s 14(1)(d).

6 Ibid s 14(1)(e).

7 Ibid s 14(1)(f). As to custodian trustees see PARA 792 et seq post.

8 Ibid s 14(1)(g).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/B. ORDINARY TRUSTEESHIP/769. Power to act as trustee.

## **B. ORDINARY TRUSTEESHIP**

### **769. Power to act as trustee.**

The Public Trustee may, by the name of Public Trustee, or by any other sufficient description, be appointed to be trustee of any will or settlement or other instrument creating a trust<sup>1</sup>, or to perform any trust or duty belonging to a class which he is authorised by rules made under the Public Trustee Act 1906 to accept, as an original, a new or an additional trustee, in like manner in all respects as if he were a private trustee<sup>2</sup>, with the addition that though the trustees originally appointed were two or more, the Public Trustee may be appointed sole trustee<sup>3</sup>. He can be so appointed and can act as a sole trustee notwithstanding that the instrument creating the trust directs that the number of trustees is not to be reduced below some larger number<sup>4</sup>. Where practicable, notice of any proposed appointment of the Public Trustee either as a new or additional trustee must be given in the prescribed manner<sup>5</sup> to all persons beneficially interested who are resident in the United Kingdom<sup>6</sup> and whose addresses are known to the persons proposing to make the appointment or, if such beneficiaries are minors, to their guardians<sup>7</sup>. In the case of the appointment of the Public Trustee by a testator, his subsequent consent, and, in every other case, his previous consent, to act is requisite<sup>8</sup>.

1 For the meaning of 'trust' for these purposes see PARA 766 note 12 ante. For the meaning of 'trust' generally see PARA 601 ante.

2 For these purposes, 'private trustee' means a trustee other than the Public Trustee: Public Trustee Act 1906 s 15.

3 See *ibid* s 5(1). See also *Re Kensit* [1908] WN 235; *Re Johnston, Mills v Johnston* (1911) 105 LT 701; *Re Firth, Firth v Loveridge* [1912] 1 Ch 806; *Forster v Williams Deacon's Bank Ltd* [1935] Ch 359, CA (where the distinction between an appointment as ordinary trustee under the Public Trustee Act 1906 s 5 and an appointment as custodian trustee under s 4 (see PARA 792 et seq post) is pointed out); *Re Duxbury's Settlement Trusts* [1995] 3 All ER 145, [1995] 1 WLR 425, CA (the Public Trustee's appointment as a sole trustee of a discretionary settlement held to be a valid appointment under the Public Trustee Act 1906 s 5(1) and to entitle him to exercise trustee's powers and discretions notwithstanding an express clause in the trust deed which prohibited an exercise of trustee's powers by fewer than two trustees).

Subject to the Public Trustee Act 1906 and the rules made thereunder, the Public Trustee may accept any trust created by a trust instrument or arising upon an intestacy, except the trusts of any instrument made solely by way of security for money: Public Trustee Rules 1912, SR & O 1912/348, r 6(a), proviso. For these purposes, 'trust instrument' includes any instrument, Act of Parliament, or Order of Court by which a trust is created or declared: r 1. The Public Trustee may accept as incident to the office of trustee the guardianship of any beneficiary who is a minor, and, where the execution of a trust is involved, the office of agent or attorney for any person; and he may receive and apply any money or damages paid to him in pursuance of CPR 21.10, which relates to the compromise of claims by persons under disability: see the Public Trustee Rules 1912, SR & O 1912/348, r 6(b), (e). *Quaere* whether CPR 21.10 is properly to be regarded as a substitute for RSC 1883 Ord 22 r 15 (revoked) referred to in the Public Trustee Rules 1912, SR & O 1912/348, r 6(e).

The Public Trustee cannot be appointed either as a new or additional trustee where the will, settlement or other instrument creating the trust or duty contains a direction to the contrary, unless the court otherwise orders: Public Trustee Act 1906 s 5(3). For the meaning of 'court' see PARA 662 note 9 ante.

4 *Re Leslie's Hassop Estates* [1911] 1 Ch 611; *Re Moxon* [1916] 2 Ch 595 (appointment out of court); *Re Duxbury's Settlement Trusts* [1995] 3 All ER 145, [1995] 1 WLR 425, CA. Where the interests of the Public Trustee as trustee of one estate conflict with the interests as trustee of another, he has no greater power than a private trustee to make a bargain with himself, and he should apply to the court to obtain its sanction to any proposed compromise: *Re New Haw Estate Trusts* (1912) 107 LT 191.

5 Any notice or application required to be given or made for the purposes of the Public Trustee Act 1906 or the Public Trustee Rules 1912, SR & O 1912/348 (as amended), to the Public Trustee may be addressed to the Public Trustee at his office in London or, if the same relates to a trust or estate in course of administration or proposed to be administered from a branch office, then at that branch office: r 40(1). Any notice or application required to be given or made for the purposes of the Public Trustee Act 1906 or the Public Trustee Rules 1912, SR & O 1912/348 (as amended) to any person other than the Public Trustee may be addressed to that person at his last known place of abode or place of business: r 40(2). Any such notice or application may be delivered at the place to which it is addressed or may be served by post: r 40(3).

6 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

7 Public Trustee Act 1906 s 5(4). Failure to give any such notice does not invalidate any appointment made under s 5: see s 5(4). If any person to whom such notice has been given applies to the court within 21 days from the receipt of the notice, the court may make an order prohibiting the appointment being made, if having regard to the interests of all the beneficiaries it considers it expedient to do so: see s 5(4). See also *Re Hope Johnstone's Settlement Trusts* (1909) 25 TLR 369; *Re Claremont* (1910) unreported, but cited in *Re Firth, Firth v Loveridge* [1912] 1 Ch 806; *Re Drake's Settlement* [1926] WN 132 (where Romer J explained that observations attributed to Parker J in the headnote to *Re Hope Johnstone's Settlement Trusts* supra were not intended to be of general application). As to the power of guardians and receivers to act for minors or persons of unsound mind or incapable of managing their affairs, and as to the powers to appoint guardians for the purposes of proceedings, see the Public Trustee Rules 1912, SR & O 1912/348, r 41.

8 See *ibid* r 8(1), (2); and *Re Shaw, Public Trustee v Little* [1914] WN 141, CA. It is the duty of any person appointed by a testator to be a co-trustee with the Public Trustee, and not renouncing or disclaiming the trust, to give to the Public Trustee notice in writing of his appointment as soon as practicable after the same has come to his knowledge: Public Trustee Rules 1912, SR & O 1912/348, r 8(3). Upon receiving an application for his consent to act as trustee or as custodian trustee the Public Trustee may require to be produced to him the trust instrument, if any, and may require to be supplied to him a copy of that instrument and of any other document affecting the trust and such particulars as to the nature and value of any trust property and the liabilities, if any, attaching to that property, or the holder thereof, and the names and places of abode of any beneficiaries and trustees under the trust, and such other information relating to the trust as he may consider it desirable to obtain in any particular case: r 9.

As soon as may be after receiving any such application the Public Trustee must take into consideration upon such evidence as may appear to him sufficient: (1) the gross capital value of the property; (2) the mode of investment and the condition of the trust property; (3) the situation, tenure and character of any land comprised in the trust property; (4) any liabilities attaching to the trust property or the holder thereof; (5) the duties incident to the office of trustee of the trust; (6) the places of abode and circumstances of any beneficiaries; and (7) all the circumstances of the case: r 10. The Public Trustee must decide whether the application ought to be accepted or refused and must give notice to the applicant of such acceptance or refusal and in the case of acceptance must in writing under his official seal signify his consent to act in the trust: r 10 (amended by SR & O 1916/489).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/B. ORDINARY TRUSTEESHIP/770. Retirement of co-trustee.

### **770. Retirement of co-trustee.**

Where the Public Trustee has been appointed a trustee of any trust<sup>1</sup>, a co-trustee may retire from the trust<sup>2</sup>, without the consents normally required<sup>3</sup> and notwithstanding that there are not more than two trustees<sup>4</sup>.

1 For the meaning of 'trust' see PARA 766 note 12 ante.

2 In accordance with the Trustee Act 1925 s 39 (as amended) (see PARA 891 post): see the Public Trustee Act 1906 s 5(2); and the Interpretation Act 1978 s 17(2)(a).

3 In required by the Trustee Act 1925 s 39 (as amended) (see PARA 891 post): see the Public Trustee Act 1906 s 5(2); and the Interpretation Act 1978 s 17(2)(a).

4 Public Trustee Act 1906 s 5(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/B. ORDINARY TRUSTEESHIP/771. Power to become legal personal representative.

## **771. Power to become legal personal representative.**

The court<sup>1</sup> having jurisdiction to do so may grant to the Public Trustee by that name, and the Public Trustee may accept by that name, probates of wills or letters of administration<sup>2</sup>. Notwithstanding that he has acted in the administration of the deceased's estate, any executor who has obtained probate or any administrator who has obtained letters of administration may, with the sanction of the court, and after such notice to the persons beneficially interested as the court may direct, transfer the estate to the Public Trustee for administration either solely or jointly with any continuing executors or administrators<sup>3</sup>.

1 For the meaning of 'court' see PARA 662 note 9 ante.

2 See the Public Trustee Act 1906 s 6(1); and the Public Trustee Rules 1912, SR & O 1912/348, r 6(c). The Public Trustee is considered as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee is not required for the grant of letters of administration to any other person, and as between the Public Trustee and the widower, widow, surviving civil partner or next of kin of the deceased, they are to be preferred to him, unless good cause is shown to the contrary: Public Trustee Act 1906 s 6(1) (amended by the Civil Partnership Act 2004 s 71, Sch 4 para 6). For these purposes, 'letters of administration' means letters of administration of the estate and effects of a deceased person, whether general or with a will annexed, or limited either in time or otherwise: Public Trustee Act 1906 s 15. The Public Trustee may accept probate or letters of administration either as principal or as agent for any person: Public Trustee Rules 1912, SR & O 1912/348, r 6(c). As to probate see further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 72 et seq.

3 Public Trustee Act 1906 s 6(2). Subject to the provisions of the Public Trustee Act 1906, the court order sanctioning the transfer confers on the Public Trustee all the powers of the transferring executor or administrator, and the transferring executor or administrator is not in any way liable in respect of any act or default in reference to the estate subsequent to the date of the order, other than an act or default of himself or of some person for whose conduct he is in law responsible: see s 6(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/C. ADMINISTRATION OF SMALL ESTATES/772. Duty of the Public Trustee to undertake administration.

### **C. ADMINISTRATION OF SMALL ESTATES**

#### **772. Duty of the Public Trustee to undertake administration.**

Where an application to the Public Trustee to administer an estate of a deceased person<sup>1</sup> is made by a person who in the opinion of the Public Trustee would be entitled to apply to the court for an order for its administration by the court, and the Public Trustee is satisfied that its gross capital value is less than £1,000<sup>2</sup>, and it appears to him that the persons beneficially entitled to it are persons of small means, he must administer the estate unless he sees good reason for refusing to do so<sup>3</sup>.

1 See *Re Devereux, Toovey v Public Trustee*[1911] 2 Ch 545 at 548 per Eve J.

2 It is at the time when the application is made, even if the original value was greater: see *Re Devereux, Toovey v Public Trustee*[1911] 2 Ch 545 at 550-551.

3 See the Public Trustee Act 1906 s 3(1). See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 707-708. Upon receiving an application under s 3(1), the Public Trustee may require to be supplied to him such evidence as to the value of the estate, and the circumstances of the persons beneficially entitled, and such other information relating thereto as he may consider it desirable to obtain in any particular case: Public Trustee Rules 1912, SR & O 1912/348, r 12. If it is not proved to the satisfaction of the Public Trustee that the gross capital value of the estate is less than £1,000, or if it does not appear to him that the persons beneficially entitled are persons of small means, or if he sees any other good reason for refusing the application, he must refuse the same and must forthwith give notice to the applicant of such refusal: r 13(1). As to notices see PARA 769 note 5 ante. For the purposes of the administration the Public Trustee has, subject to the Public Trustee Rules 1912, SR & O 1912/348 (as amended), all the administrative powers and authorities exercisable by a master of the Supreme Court acting in the administration of an estate: Public Trustee Act 1906 s 3(3); and see the Public Trustee Rules 1912, SR & O 1912/348, r 14. A refusal under r 13 by the Public Trustee to administer the estate does not prevent him from exercising with respect to the estate any other powers exercisable by him under the Public Trustee Act 1906 or the Public Trustee Rules 1912, SR & O 1912/348 (as amended), which he may be duly appointed to exercise: see r 13(3). As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

#### **UPDATE**

#### **772 Duty of the Public Trustee to undertake administration**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/C. ADMINISTRATION OF SMALL ESTATES/773. Effect of undertaking of administration.

### **773. Effect of undertaking of administration.**

On the Public Trustee undertaking, by declaration in writing signed and sealed by him, to administer an estate, the trust property other than stock and the right to transfer or call for the transfer of stock forming part of the estate vest in him in like manner as if vesting orders for the purpose had been made<sup>1</sup> by the High Court<sup>2</sup>. As from such vesting, any trustee entitled under the trust to administer the estate is discharged from all liability attaching to the administration, except in respect of past acts<sup>3</sup>. The Public Trustee cannot himself exercise the right of transferring the stock without the leave of the court<sup>4</sup>.

<sup>1</sup> See under the Trustee Act 1925 (see PARA 869 et seq post): see the Public Trustee Act 1906 s 3(2); and the Interpretation Act 1978 s 17(2)(a).

<sup>2</sup> See the Public Trustee Act 1906 s 3(2). The Trustee Act 1925 applies accordingly: Public Trustee Act 1906 s 3(2); Interpretation Act 1978 s 17(2)(a). In addition to making such a declaration, the Public Trustee must give notice to the applicant that the application is accepted, and must take such other steps as may be necessary or proper to enable him to administer the estate; and any person having the custody of the probate or letters of administration or other document relating to the estate must, upon the request in writing of the Public Trustee, deliver the same to him or as he directs: Public Trustee Rules 1912, SR & O 1912/348, r 13(2). As to notices see PARA 769 note 5 ante.

<sup>3</sup> Public Trustee Act 1906 s 3(2).

<sup>4</sup> Ibid s 3(2) proviso (a). The application for leave should be made by a claim form and not by an application under the Public Trustee Rules 1912, SR & O 1912/348, r 15 (as amended) (see PARA 774 post) and should be made without notice; no person need be served: *Re Wells, Re Public Trustee Act 1906* [1914] WN 404 (where the form of order approved by Eve J is set out). As to procedure generally see PARA 776 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/C. ADMINISTRATION OF SMALL ESTATES/774. Taking the opinion of the court.

#### **774. Taking the opinion of the court.**

The Public Trustee may take the opinion of the High Court upon any question arising in the course of an administration without judicial proceedings<sup>1</sup>. Any such question must be submitted to such judge of the Chancery Division as specified and in such manner as that judge may direct<sup>2</sup>. Before giving his opinion the judge may require the attendance of, or communicate with, any person interested in the estate as trustee or beneficiary; but no such person has a right to be heard by the judge unless he otherwise directs<sup>3</sup>. The judge must give his opinion to the Public Trustee who must act in accordance with such opinion and must, upon the request in writing of any such interested person, communicate to him the effect of such opinion<sup>4</sup>.

1 See the Public Trustee Act 1906 s 3(4); and the Public Trustee Rules 1912, SR & O 1912/348, r 15(1) (amended by SI 1983/1050).

2 Public Trustee Rules 1912, SR & O 1912/348, r 15(2) (substituted by SI 1983/1050).

3 Public Trustee Rules 1912, SR & O 1912/348, r 15(4).

4 Ibid r 15(5).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/C. ADMINISTRATION OF SMALL ESTATES/775. Order for administration by the Public Trustee.

### **775. Order for administration by the Public Trustee.**

Where proceedings have been instituted in any court for the administration of an estate, and by reason of its small value it appears to the court that the estate can be more economically administered by the Public Trustee than by the court, or that for any other reason it is expedient that the estate should be administered by the Public Trustee instead of the court, the court may order that it be so administered<sup>1</sup>.

<sup>1</sup> See the Public Trustee Act 1906 s 3(5); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 708. When such an order is made, the provisions of s 3 apply as if the administration of the estate had been undertaken by the Public Trustee in pursuance of those provisions: see s 3(5).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/D. PROCEDURE/776. Procedure.

## ***D. PROCEDURE***

### **776. Procedure.**

All applications to the High Court under the Public Trustee Act 1906 must be made to a judge of the Chancery Division sitting in private<sup>1</sup>. An application to the High Court or a county court under the Public Trustee Act 1906 must be made by a claim form<sup>2</sup> or an application in existing proceedings<sup>3</sup>.

1 CPR Sch 1 RSC Ord 93 r 2. This is without prejudice to the Public Trustee Act 1906 s 10(2) (cited in PARA 788 post) and s 13(7) (cited in PARA 778 note 3 post).

2 See CPR Pt 8; and PARA 643 ante.

3 See CPR Pt 23.

## **UPDATE**

### **776 Procedure**

NOTE 1--CPR Sch 1 RSC Ord 93 r 2 revoked: SI 2006/3435.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/E. INVESTIGATION OF TRUST ACCOUNTS/777. Application for investigation and audit of accounts.

## ***E. INVESTIGATION OF TRUST ACCOUNTS***

### **777. Application for investigation and audit of accounts.**

On an application being made<sup>1</sup> and notice thereof given<sup>2</sup> by any trustee or beneficiary, the condition and accounts of any trust<sup>3</sup> must, unless the court<sup>4</sup> otherwise orders, be investigated and audited by such solicitor<sup>5</sup> or public accountant as may be agreed on by the applicant and the trustees or, in default of agreement, by the Public Trustee or some person appointed by him<sup>6</sup>. If within one month from the date of the application no solicitor or public accountant has been appointed by the applicant and the trustees to conduct the investigation and audit, there is deemed to be a default of agreement<sup>7</sup> and the applicant may apply to the Public Trustee accordingly<sup>8</sup>.

Upon receiving any such application the Public Trustee may in his absolute discretion by notice to the applicant require that before a day to be specified in the notice such security (by deposit of a sum of money) as he deems sufficient is to be given to him by the applicant for the payment of any expenses of the investigation and audit which may be ordered by the Public Trustee to be paid by the applicant personally<sup>9</sup>.

The Public Trustee may in his absolute discretion upon the application of any trustee or beneficiary direct that the investigation and audit are to extend only to a specified period of time or to a specified part of the trust property or are to be otherwise restricted<sup>10</sup>.

1 Any such application must be made to the Public Trustee: Public Trustee Rules 1912, SR & O 1912/348, r 31. As to service of notices see PARA 769 note 5 ante.

2 Any notice of such an application must, unless the Public Trustee otherwise directs, be given by the applicant to every other person being a trustee or beneficiary under the trust: *ibid* r 31.

3 For the meaning of 'trust' see PARA 766 note 12 ante.

4 For the meaning of 'court' see PARA 662 note 9 ante.

5 As to references to a solicitor see PARA 766 note 14 ante.

6 See the Public Trustee Act 1906 s 13(1). Except with the leave of the court such an investigation and audit may not be required within 12 months after any such previous investigation or audit; and a trustee or beneficiary may not be appointed under s 13 to make an investigation or audit: s 13(1) proviso.

7 *Ie* within the meaning of *ibid* s 13(1): see the text and note 6 *supra*.

8 Public Trustee Rules 1912, SR & O 1912/348, r 34.

9 *Ibid* r 32(1). Where any such requirement is made, no further proceedings may be taken upon the application until the security has been given; and, if the same is not given before the day specified in the notice, the application must be disallowed unless under special circumstances the Public Trustee thinks fit to extend the time for giving the security or to dispense with it: r 32(2). Any sum so deposited must be kept by the Public Trustee on deposit in his name and in a separate account at a bank until all proceedings in connection with the investigation and audit have been concluded; and thereupon the deposited sum and the interest, if any, allowed on it by the bank must be applied in or towards payment of any expenses of the investigation and audit which may be so ordered to be paid by the applicant personally, and the balance, if any, must be paid to the applicant: see r 32(3).



10 Ibid r 33.

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### **778. Auditor's powers.**

The person making the investigation or audit ('the auditor') has a right of access to the books, accounts and vouchers of the trustees and to any securities and documents of title held by them on account of the trust<sup>1</sup> and may require from them such information and explanation as may be necessary for the performance of his duties<sup>2</sup>. If any person having the custody of any documents to which the auditor has such a right of access fails or refuses to allow him to have access to them or in anywise obstructs the investigation or audit, the auditor may apply to the court<sup>3</sup> and thereupon the court may make such order as it thinks just<sup>4</sup>.

1 For the meaning of 'trust' see PARA 766 note 12 ante.

2 Public Trustee Act 1906 s 13(2).

3 For the meaning of 'court' see PARA 662 note 9 ante. An application under or for the purposes of *ibid* s 13 must be made to a judge of the Chancery Division: s 13(7). See also PARA 776 ante.

4 *Ibid* s 13(6). See *Re Williams* (1910) 26 TLR 604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/E. INVESTIGATION OF TRUST ACCOUNTS/779. Removal of auditor and appointment of new auditor.

### **779. Removal of auditor and appointment of new auditor.**

The auditor<sup>1</sup> may be removed by an order of the court; and, if any auditor is removed or resigns, dies or becomes bankrupt or incapable of acting before the investigation and audit are completed, a new auditor may be appointed in his place in like manner as the original auditor<sup>2</sup>.

1 For the meaning of 'the auditor' see PARA 778 ante.

2 Public Trustee Act 1906 s 13(4).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/E. INVESTIGATION OF TRUST ACCOUNTS/780. Report and certificate of auditor.

## **780. Report and certificate of auditor.**

On the completion of the investigation and audit, the auditor<sup>1</sup> must forward to the applicant and to every trustee a copy of the accounts, together with a report on those accounts and a certificate signed by him to the effect that the accounts exhibit a true view of the state of the affairs of the trust, and that he has had the securities of the trust fund investments produced to and verified by him or, as the case may be, that such accounts are deficient in such respects as may be specified in his certificate<sup>2</sup>.

Every beneficiary under the trust is entitled at all reasonable times to inspect and take copies of the accounts, report and certificate and, at his own expense, to be furnished with copies or extracts<sup>3</sup>.

If any person in any statement of accounts, report or certificate required for these purposes wilfully makes a statement false in any material particular, he is liable on conviction to imprisonment or a fine or both<sup>4</sup>.

1 For the meaning of 'the auditor' see PARA 778 ante.

2 Public Trustee Act 1906 s 13(2).

3 Ibid s 13(3).

4 See ibid s 13(8); and the Criminal Justice Act 1948 s 1(2). Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both, or on summary conviction to imprisonment for a term not exceeding six months or a fine or both: see s 13(8); and the Criminal Justice Act 1948 s 1(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/E. INVESTIGATION OF TRUST ACCOUNTS/781. Expenses of audit.

## **781. Expenses of audit.**

The amount of the auditor's<sup>1</sup> remuneration and the other expenses<sup>2</sup> of the investigation and audit is such as may be determined by the Public Trustee; but he may refer the costs of any solicitor<sup>3</sup>, being part of such expenses, for detailed assessment to a costs judge<sup>4</sup> and in such case the amount of such costs when assessed must be included in such expenses<sup>5</sup>. Unless the Public Trustee otherwise directs, the amount must be borne by the estate, but he may order it to be borne by the applicant or by the trustees personally, or partly by them and partly by the applicant<sup>6</sup>.

1 For the meaning of 'the auditor' see PARA 778 ante.

2 For the meaning of 'expenses' see PARA 766 note 9 ante.

3 As to references to a solicitor see PARA 766 note 14 ante.

4 As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

5 See the Public Trustee Act 1906 s 13(5); and the Public Trustee Rules 1912, SR & O 1912/348, r 35. Where any investigation or audit has been made, copies of the auditor's report and certificate under the Public Trustee Act 1906 s 13(2) (see PARA 780 ante) and such copies of accounts and other documents as the Public Trustee may require must be forwarded to him by the auditor and considered by the Public Trustee before giving any direction or making any order under s 13(5): Public Trustee Rules 1912, SR & O 1912/348, r 36(1). The expense of making and forwarding any such copies and the fee of the Public Trustee (within the limits prescribed by or in pursuance of any order relating to the fees of the Public Trustee for the time being in force) are, for the purposes of the Public Trustee Act 1906 s 13(5), part of the expenses of the investigation and audit: Public Trustee Rules 1912, SR & O 1912/348, r 36(2).

Before making any order under the Public Trustee Act 1906 s 13(5), the Public Trustee must, if any of the parties interested so desire, hear those parties in such manner as he thinks fit: Public Trustee Rules 1912, SR & O 1912/348, r 37(1). Any such order must specify the person by or to whom any sum is to be paid and its amount; however, such an order may direct payment of the taxed costs of any solicitor employed in connection with the investigation and audit, and such costs must be paid as if such amount had been specified in the order: r 37(2). Any such order may be enforced in the same manner as a judgment or order of the court to the same effect: r 37(3). The costs of wholly unnecessary applications may be directed to be paid by the applicant: *Re Utley, Russell v Cubitt* [1912] WN 147. A person ordered to pay costs may appeal from the order: *Re Oddy* [1911] 1 Ch 532.

6 Public Trustee Act 1906 s 13(5).

### **UPDATE**

#### **781 Expenses of audit**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

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## ***F. CONDUCT OF BUSINESS***

### **782. The register.**

There must be kept at the Central Office in London of the Public Trustee such registers and other books as are required for recording or entering in a convenient form as to each trust or estate which the Public Trustee is administering the following particulars<sup>1</sup>:

- 91 (1) the date of the acceptance of the trust or of his declaration<sup>2</sup>;
- 92 (2) particulars of the trust property from time to time<sup>3</sup>;
- 93 (3) the names and place of abode of the person in receipt of the income of the trust property<sup>4</sup>;
- 94 (4) a reference to any notice received of any dealing with any beneficial interest in the trust property and of any exercise or release of any power relating to the trust or estate<sup>5</sup>;
- 95 (5) an entry of any decision or opinion of the High Court in respect of the trust or estate<sup>6</sup>;
- 96 (6) such entries of his decisions and such other particulars as the Public Trustee may think fit<sup>7</sup>.

These particulars must be recorded or entered accordingly<sup>8</sup>.

Upon an application in writing by or with the authority of any person interested in the trust property the Public Trustee must<sup>9</sup>:

- 97 (a) permit the applicant or his solicitor<sup>10</sup> or other authorised agent to inspect and take copies of any entry in any register or book relating to the trust or estate and, so far as the interest of the applicant in the trust property is or may be affected thereby, of any account, notice or other document in the custody of the Public Trustee<sup>11</sup>;
- 98 (b) at the expense of the applicant supply him or his solicitor or other authorised agent with a copy of any such entry, account, notice or document or with any extract therefrom<sup>12</sup>;
- 99 (c) give to the applicant or his solicitor or other authorised agent such information respecting the trust or estate and the trust property as may be reasonably requested in the application and is within the power of the Public Trustee<sup>13</sup>.

Subject to these provisions the Public Trustee must observe strict secrecy in respect of every trust or estate in course of administration by him<sup>14</sup>.

1 Public Trustee Rules 1912, SR & O 1912/348, r 16.

2 Ibid r 16(a). The reference in the text is to declarations made under the Public Trustee Act 1906 s 3(2): see PARA 773 ante.

3 Public Trustee Rules 1912, SR & O 1912/348, r 16(b).

- 4 Ibid r 16(c).
- 5 Ibid r 16(d).
- 6 Ibid r 16(e).
- 7 Ibid r 16(f).
- 8 Ibid r 16.
- 9 Ibid r 29(1).
- 10 As to references to a solicitor see PARA 766 note 14 ante.
- 11 Public Trustee Rules 1912, SR & O 1912/348, r 29(1)(a).
- 12 Ibid r 29(1)(b).
- 13 Ibid r 29(1)(c).
- 14 Ibid r 29(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/F. CONDUCT OF BUSINESS/783. Accounts, payments etc.

### 783. Accounts, payments etc.

Separate accounts must be kept for every trust or estate<sup>1</sup>; and a separate account must be kept of the capital of the trust property and of the mode in which it is from time to time invested, and all dealing with such capital must be entered in the account<sup>2</sup>. A separate account must be kept of the income of the trust property, if received by the Public Trustee, and of the mode in which it is from time to time dealt with by the Public Trustee<sup>3</sup>.

The Public Trustee may<sup>4</sup>:

- 100 (1) invest or retain invested money belonging to any trust or estate and coming into his hands in any mode of investment expressly or implicitly authorised by the trust instrument or, if there is no trust instrument, authorised by law for the investment of trust funds<sup>5</sup>;
- 101 (2) pay and deposit such money in court for investment<sup>6</sup>;
- 102 (3) if authorised by the trust instrument or otherwise by law, retain any investment existing at the date of the commencement of the trust<sup>7</sup>.

He may not, however, invest in or hold any investment in such manner as to expose him to liability as the holder thereof, unless he is satisfied that he is fully indemnified or secured against loss<sup>8</sup>.

All payments of money to or from the capital of the trust property must be made through the bank to the trust or estate<sup>9</sup>.

All sums payable out of the income or capital of the trust properly must be made by a cheque on the Bank of England<sup>10</sup> bearing a signature or a facsimile signature of an officer of the Public Trustee authorised in writing by him to act in that behalf or a cheque on a bank signed by not less than two persons, namely<sup>11</sup>:

- 103 (a) by the Public Trustee and a co-trustee<sup>12</sup>; or
- 104 (b) by the Public Trustee and an officer of the Public Trustee authorised in writing by him to act in that behalf, either generally or in any particular case<sup>13</sup>; or
- 105 (c) by a co-trustee and one such duly authorised officer<sup>14</sup>; or
- 106 (d) by two such duly authorised officers<sup>15</sup>.

However, in any particular case the Public Trustee may authorise the payment of income by the person liable to pay the same direct to the person entitled to receive the same or to his bank<sup>16</sup>.

The income of the trust property may be paid to the person for the time being entitled to receive the same either through a bank or direct<sup>17</sup>.

If the special circumstances of the case appear to him to render it desirable, the Public Trustee may pay to any other trustee of the trust or allow him to receive the income of the trust property or any part of it on that trustee undertaking to apply it in the manner directed by the trust<sup>18</sup>.



The Public Trustee may make advances for the purposes of any trust or estate in the course of administration or about to be administered by him out of any moneys which may be placed at his disposal by the Treasury for that purpose, and upon such terms as he may think proper<sup>19</sup>.

The Public Trustee may at any time require a statutory declaration or other sufficient evidence that a person is alive and is the person to whom any money or property is payable or transferable, and may refuse payment or transfer until such declaration or evidence is produced<sup>20</sup>.

The accounts of the Public Trustee must be audited and the securities held by him must be verified from time to time by such person or persons as the Treasury may appoint in accordance with regulations made by the Treasury<sup>21</sup>.

1 Public Trustee Rules 1912, SR & O 1912/348, r 19(1).

2 Ibid r 19(2).

3 Ibid r 19(3).

4 Ibid r 17 (substituted by SI 1987/2249).

5 Public Trustee Rules 1912, SR & O 1912/348, r 17(a) (as substituted: see note 4 supra). For the meaning of 'trust instrument' for these purposes see PARA 769 note 3 ante. As to the power to invest see PARA 1007 et seq post.

6 Ibid r 17(b) (as substituted: see note 4 supra). The payment or deposit into court must be made in a manner authorised by rules made under the Administration of Justice Act 1982 s 38(7): see CIVIL PROCEDURE vol 12 (2009) PARA 1548.

7 Public Trustee Rules 1912, SR & O 1912/348, r 17(c) (as substituted: see note 4 supra).

8 Ibid r 17 proviso (as substituted: see note 4 supra). As to the general deposit fund for money awaiting investment or distribution see PARA 790 post.

9 Ibid r 20.

10 As to the Bank of England see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 793 et seq.

11 Public Trustee Rules 1912, SR & O 1912/348, r 22 (amended by SI 1983/1050).

12 Public Trustee Rules 1912, SR & O 1912/348, r 22(a).

13 Ibid r 22(b).

14 Ibid r 22(c).

15 Ibid r 22(d).

16 Ibid r 22 proviso.

17 Ibid r 23(1); and see the Married Women (Restraint upon Anticipation) Act 1949 s 1(1), (2) (amended by the Statute Law (Repeals) Act 1975). Where authority is given to any corporation or bank to pay income to any person, the books of that corporation or bank showing the payment of that income in accordance with that authority is a sufficient discharge to the Public Trustee: Public Trustee Rules 1912, SR & O 1912/348, r 23(2). Where authority is given to any person to pay any income to the bank of the person entitled, the certificate of that bank stating the receipt of that income is a sufficient discharge to the Public Trustee: r 23(3). Where any person is solely entitled to receive any income, the Public Trustee may, on the request in writing of that person, authorise that person for such period as the Public Trustee may think fit to collect or arrange for the collection of such income; and during the continuance of any such authority such request in writing is a sufficient discharge to the Public Trustee in respect of such income: r 23(4); and see the Married Women (Restraint upon Anticipation) Act 1949 s 1(1), (2) (as so amended).

18 Public Trustee Rules 1912, SR & O 1912/348, r 24.

19 Ibid r 25. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

20 Ibid r 27. See also *Re Wilson* [1964] 1 All ER 196, [1964] 1 WLR 214. Where a person appearing to be beneficially entitled to any sum of money under the trust or to be interested in the trust property cannot be found or it is not known whether he is living or dead, the Public Trustee may apply to the court for directions as to the course to be taken with reference to that person and, until a court order is made, must keep any sum payable to that person, and, if it is kept for more than six months, must invest it or deposit it at interest and accumulate the dividends or interest: Public Trustee Rules 1912, SR & O 1912/348, r 28.

If the rules require a declaration to be made for any purpose, a person who makes such a declaration, knowing it to be untrue in any material particular, is guilty of an offence: Public Trustee Act 1906 s 14(3).

21 Public Trustee Rules 1912, SR & O 1912/348, r 38.

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#### **784. Custody of documents.**

The securities and documents belonging or relating to a trust or estate which the Public Trustee is administering must, if under his control, be kept at the bank to the trust or estate or at some other safe place of deposit allowed generally or specially by the Treasury, so far as the convenience of business will admit<sup>1</sup>. All orders for the withdrawal of securities or documents from any such bank or other place of deposit must be signed by not less than two persons, namely<sup>2</sup>:

- 107 (1) by the Public Trustee and a co-trustee<sup>3</sup>; or
- 108 (2) by the Public Trustee and an officer of the Public Trustee authorised in writing by him to act in that behalf, either generally or in any particular case<sup>4</sup>; or
- 109 (3) by a co-trustee and one such duly authorised officer<sup>5</sup>; or
- 110 (4) by two such duly authorised officers<sup>6</sup>.

1 Public Trustee Rules 1912, SR & O 1912/348, r 18(1). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2 Ibid r 18(2).

3 Ibid r 18(2)(a).

4 Ibid r 18(2)(b).

5 Ibid r 18(2)(c).

6 Ibid r 18(2)(d).

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### **785. Execution of documents.**

In all cases where any deed or other instrument requires to be executed by the Public Trustee under his official seal, the affixing of the seal may be authenticated by the signature either of the Public Trustee or of some officer of the Public Trustee duly authorised by the Public Trustee in that behalf under his seal; and any deed or other instrument purporting to be a deed or instrument executed by the Public Trustee and to be sealed with his seal authenticated in the above manner must be received in evidence and is deemed to be a deed or instrument so executed without further proof unless the contrary is shown<sup>1</sup>.

<sup>1</sup> Public Trustee Rules 1912, SR & O 1912/348, r 21 (substituted by SR & O 1916/489). As to the execution of deeds generally see DEEDS AND OTHER INSTRUMENTS.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/F. CONDUCT OF BUSINESS/786. Dealings with the Public Trustee not notice of trust.

**786. Dealings with the Public Trustee not notice of trust.**

The entry of the Public Trustee by that name in the books of a company does not constitute notice of a trust; and a company is not entitled to object to enter the name of the Public Trustee on its books by reason only of his being a corporation, and in dealings with property the fact that the person or one of the persons dealt with is the Public Trustee does not of itself constitute notice of a trust<sup>1</sup>.

<sup>1</sup> Public Trustee Act 1906 s 11(5).

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### **787. Employment of solicitors and other agents.**

The Public Trustee may employ for the purpose of any trust such solicitors<sup>1</sup>, bankers, accountants, brokers or other persons as he may consider necessary<sup>2</sup>. In determining the persons to be so employed in relation to any trust, he must have regard to the interests of the trust, but subject to this, he must, whenever practicable, take into consideration the wishes of the creator of the trust and of the other trustees, if any, and of the beneficiaries, either expressed or as implied by the practice of the creator of the trust or in the previous management of the trust<sup>3</sup>.

1 As to references to a solicitor see PARA 766 note 14 ante.

2 Public Trustee Act 1906 s 11(2). Subject to the provisions of the Public Trustee Act 1906 and the Public Trustee Rules 1912, SR & O 1912/348 (as amended), and to the terms of any particular trust, the Public Trustee may, in the administration of any trust or estate, take and use professional advice and assistance in regard to legal and other matters and may act on credible information (although less than legal evidence) as to matters of fact: r 26. Any officer of the Public Trustee who is authorised by him in writing in that behalf may take any oath, make any declaration, verify any account and give personal attendance at any court or place, but this does not confer upon any person not otherwise entitled any right of audience before a court or tribunal or any right to do any act which could otherwise only lawfully be done by a barrister or solicitor: see the Public Trustee Act 1906 s 11(3); and the Public Trustee Rules 1912, SR & O 1912/348, r 39.

3 Public Trustee Act 1906 s 11(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/F. CONDUCT OF BUSINESS/788. Right of appeal.

### **788. Right of appeal.**

A person aggrieved<sup>1</sup> by any act or omission or decision of the Public Trustee in relation to any trust may apply to the court<sup>2</sup>, and the court may make such order in the matter as it thinks just<sup>3</sup>. Such an application to the High Court must be made to a judge of the Chancery Division<sup>4</sup>.

1 For the meaning of 'person aggrieved' see *Re Wilson* [1964] 1 All ER 196 at 198, [1964] 1 WLR 214 at 216. See also ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 41, and JUDICIAL REVIEW vol 61 (2010) PARA 664.

2 For the meaning of 'court' see PARA 662 note 9 ante.

3 Public Trustee Act 1906 s 10(1). See also *Re Oddy* [1911] 1 Ch 532. The discharge by the Public Trustee of any functions under the Public Trustee and Administration of Funds Act 1986 s 3 (see PARA 767 ante) is not to be treated as the discharge of the duties of his office for the purposes of the Public Trustee Act 1906 s 10: Public Trustee and Administration of Funds Act 1986 s 3(6)(c).

4 Public Trustee Act 1906 s 10(2). As to procedure in the High Court generally see PARA 776 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/G. DISCHARGE OF LIABILITIES/789. Discharge of liabilities.

## ***G. DISCHARGE OF LIABILITIES***

### **789. Discharge of liabilities.**

It would appear that, in accordance with modern financial practice, the Lord Chancellor will meet from his Estimate<sup>1</sup> any personal liability incurred by the Public Trustee in that capacity<sup>2</sup>.

<sup>1</sup> As to the Lord Chancellor's Estimate see PARLIAMENT vol 78 (2010) PARA 1033. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

<sup>2</sup> The Public Trustee Act 1906 s 7 (repealed) formerly imposed on the Consolidated Fund of the United Kingdom liability to make good all sums required to discharge any liability which the Public Trustee, if he were a private trustee, would be personally liable to discharge, without making any specific provision to replace it: see the explanatory notes to the Public Trustee (Liability and Fees) Act 2002 s 1. As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARAS 1028-1031.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/H. REMUNERATION/790. Salary and fees.

## **H. REMUNERATION**

### **790. Salary and fees.**

The Public Trustee must be paid such salary or fees as the Lord Chancellor determines with the consent of the Treasury<sup>1</sup>; and such fees are chargeable in respect of the Public Trustee's duties as the Lord Chancellor may fix<sup>2</sup>. These fees are fixed by fees orders made by statutory instrument<sup>3</sup>. Every fees order must indicate, with respect to every fee fixed by the order, whether it is payable out of capital or income<sup>4</sup>. Where, however, a fees order provides that a fee is to be payable out of capital and it appears to the Public Trustee that there are special reasons in the case of a particular trust fund<sup>5</sup> which render it expedient that the fee should be paid out of income, he may direct that the fee in that case is to be payable out of income<sup>6</sup>.

The Public Trustee is authorised to maintain a general deposit fund or deposit in banks and in the National Savings Bank<sup>7</sup>, to include in this fund or deposit such trust moneys as he thinks fit, being moneys awaiting investment or distribution, and to credit a part<sup>8</sup> of the interest to the trusts and treat the remainder as fees<sup>9</sup>.

No reward other than the permitted fees may be taken by the Public Trustee or any of his officers for discharging the duties of the office<sup>10</sup>.

1 See the Public Trustee Act 1906 s 8(1A) (as added); and PARA 766 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

2 See *ibid* s 9(1) (amended by Public Trustee (Liability and Fees) Act 2002 s 2(1)(a)). The discharge by the Public Trustee of any functions under the Public Trustee and Administration of Funds Act 1986 s 3 is not to be treated as the discharge of the duties of his office for the purposes of the Public Trustee Act 1906 s 9 (as amended): Public Trustee and Administration of Funds Act 1986 s 3(6)(b).

The fees must be applied as an appropriation in aid of money provided by Parliament for expenses under the Public Trustee Act 1906 and, so far as not so applied, must be paid into the Exchequer: s 9(3) (amended by the Public Trustee (Liability and Fees) Act 2002 s 2(1)(b)). Any expenses which might be retained or paid out of the trust property if the Public Trustee were a private trustee are to be so retained or paid, and the fees are to be retained or paid in the like manner as and in addition to such expenses: Public Trustee Act 1906 s 9(2). For the meaning of 'private trustee' see PARA 769 note 2 ante. The incidence of any expenses retained or paid under these provisions as between capital and income must be determined by the Public Trustee: s 9(5) (amended by the Public Trustee (Fees) Act 1957 s 1(5)). As to the incidence of fees between capital and income see the text and notes 3-5 *infra*.

3 See the Public Trustee (Fees) Act 1957 s 1(1) (amended by the Public Trustee (Liability and Fees) Act 2002 s 2(3)). Subject to the provisions of the Public Trustee (Fees) Act 1957, any fees order may contain such incidental and supplementary provisions as may appear to the Lord Chancellor to be necessary or expedient for the purposes of the order: s 1(1) (as so amended). As to the current fees order see the Public Trustee (Fees) Order 1999, SI 1999/855 (as amended); and PARA 791 post.

4 Public Trustee (Fees) Act 1957 s 1(2).

5 For these purposes, 'trust fund' includes any part of a trust fund, and also includes an estate administered by the Public Trustee and any part of such an estate; and 'trust' includes an executorship or administratorship, and also includes the administration of an estate in pursuance of the Public Trustee Act 1906 s 3 (see PARA 772 et seq ante), and any reference to the acceptance of a trust is to be construed accordingly: Public Trustee (Fees) Act 1957 s 3(1). Otherwise, expressions used both in the Public Trustee (Fees) Act 1957 and in the Public Trustee Act 1906 have the same meaning in the former Act as in the latter: Public Trustee (Fees) Act 1957 s 3(2).

6 See *ibid* s 1(3). If, however, a person of full age is for the time being beneficially entitled in possession to the income of the trust fund, being so entitled directly under the trust in relation to which the fee is payable and not by virtue of a derivative settlement, the Public Trustee must not give such a direction except with the consent in writing of that person: s 1(3) proviso. The power conferred by s 1(3) applies to any trust whenever accepted by the Public Trustee: s 1(4).

7 As to the National Savings Bank see *FINANCIAL SERVICES AND INSTITUTIONS* vol 49 (2008) PARA 810 et seq.

8 See the Public Trustee (General Deposit Fund) Act 1939 preamble.

9 See *ibid* preamble, s 1(3). The establishment of the fund and the dealings of the Public Trustee with it were retrospectively legalised by s 1(1).

10 See the Public Trustee Act 1906 s 11(1).

## **UPDATE**

### **790 Salary and fees**

NOTE 3--SI 1999/855 replaced: Public Trustee (Fees) Order 2008, SI 2008/611.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(iii) The Public Trustee/H. REMUNERATION/791. Particular fees payable.

## **791. Particular fees payable.**

On accepting a trust the Public Trustee is entitled to charge an acceptance fee<sup>1</sup>. Thereafter, he is entitled to charge an administration fee at the commencement of each financial year, but no administration fee is payable in respect of the period between the date of acceptance of a trust and the commencement of the next financial year<sup>2</sup>. The administration fee is payable in 12 equal instalments to be paid on the 1st of each month in any financial year<sup>3</sup>. However, where during any financial year the Public Trustee ceases to act in any estate or trust, any remaining instalments due for that financial year cease to be payable<sup>4</sup>.

A withdrawal fee is payable<sup>5</sup>: (1) upon the Public Trustee ceasing to act: (a) as trustee or manager of any specified scheme or funds<sup>6</sup> whether upon retirement or otherwise; or (b) other than on retirement, in any estate or trust; or (2) upon the withdrawal or distribution of any part of the estate or the trust property or of the capital of such scheme or fund<sup>7</sup>. The Public Trustee is entitled to charge fees for special services<sup>8</sup>. He is authorised to compromise any dispute about his right to a fee or about the amount due<sup>9</sup>, and to remit fees in certain cases<sup>10</sup>; and may, if it appears just and reasonable, agree to postpone the payment of any fee<sup>11</sup>. General provision is made for valuing trust property for ascertaining the amount of fees<sup>12</sup>. Where the Public Trustee accepts an executorship, fees are charged on a different basis and are known as executorship fees<sup>13</sup>.

Provision is made for an additional fee to be charged to enable the Public Trustee to be reimbursed in respect of value added tax<sup>14</sup>.

Fees are generally paid out of capital, although some are paid out of income<sup>15</sup>.

1 As to acceptance fees see the Public Trustee (Fees) Order 1999, SI 1999/855, Pt III (arts 12-15) (as amended: see PARAS 772-774 ante). The Public Trustee is not, however, entitled to charge an acceptance fee: (1) where the trust consists entirely of an annuity or other terminable payment purchased by any person in the name of, transferred to or covenanted to be paid by the Public Trustee for the benefit of some other person; or (2) in respect of any estate which the Public Trustee accepts as executor on or after 1 April 1977 during the period he so acts: see art 12. As to fees for additional work see art 27; and note 8 infra. For special provision as to additional property coming to a trust and property not in possession or not readily realisable see arts 13, 14. As to the amount of the acceptance fee see art 15.

2 See *ibid* art 16(1) (substituted by SI 2007/681). As to the amount of the administration fee see the Public Trustee (Fees) Order 1999, SI 1999/855, arts 17, 18 (art 17 amended by SI 2003/690, SI 2004/799, SI 2005/351, SI 2007/681).

3 Public Trustee (Fees) Order 1999, SI 1999/855, art 16(1) (substituted by SI 2007/681).

4 Public Trustee (Fees) Order 1999, SI 1999/855, art 16(2) (added by SI 2007/681).

5 Public Trustee (Fees) Order 1999, SI 1999/855, art 19 (amended by SI 2003/690). As to the amount of the withdrawal fee see the Public Trustee (Fees) Order, SI 1999/855, art 20 (amended by SI 2003/690, SI 2004/799, SI 2007/681).

6 Public Trustee (Fees) Order 1999, SI 1999/855, art 19(a) (substituted by SI 2007/681). The specified schemes or funds are those under the Public Trustee (Fees) Order 1999, SI 1999/855, Pt VII (art 30) (superannuation schemes and friendly societies): see note 8 infra.

7 *Ibid* art 19(b) (amended by SI 2003/690). In the case of the Public Trustee (Fees) Order 1999, SI 1999/855, art 19(b), however, no withdrawal fee is payable where: (1) the Public Trustee ceases to act as executor of an estate in respect of which an executorship fee is payable (art 19(b)(i)); (2) trust property held upon a

declaration of trust in favour of one beneficiary only is withdrawn for the purposes of transfer to a new executorship or a new trust accepted by the Public Trustee (art 19(b)(ii)); (3) the Public Trustee is acting other than as trustee or manager of any scheme or fund under Part VII and the trust or estate has a total value of £30,000 or less on 31 March 2004 (art 19(b)(iii) (substituted by SI 2004/799)); or (4) trust property or capital of a scheme or fund under the Public Trustee (Fees) Order, SI 1999/855, Pt VII is withdrawn for the purpose of paying any fees prescribed by the Public Trustee (Fees) Order, SI 1999/855 (as amended) (art 19(b)(iv) (amended by SI 2003/690)).

8 See the Public Trustee (Fees) Order, SI 1999/855, Pt VI (arts 21-29). These fees are: (1) insurance fees (see art 21); (2) stockbroker's commission fees (see art 22); (3) audit fees (see art 23); (4) income collection fees (see art 24 (amended by SI 2005/351)); (5) investigation fees (see the Public Trustee (Fees) Order, SI 1999/855, art 25); (6) fees for agency work (see art 26); (7) fees for additional work (see art 27); (8) registration and inquiry fees (see art 28); and (9) fees for registration of documents in respect of deceased persons and searches of the register (see art 29 (amended by SI 2003/690)). A management fee is payable where the Public Trustee is acting as trustee of a superannuation scheme or is managing funds on behalf of the trustees of a friendly society: see the Public Trustee (Fees) Order, SI 1999/855, art 30 (amended by SI 2003/351, SI 2003/690).

9 Public Trustee (Fees) Order, SI 1999/855, art 7(2)(a) (amended by SI 2002/2232).

10 The Public Trustee may remit so much as appears to him equitable of any fee payable in respect of any estate or trust where the whole or any part of the property is in another estate or trust in which he is acting: Public Trustee (Fees) Order, SI 1999/855, art 7(1). The Public Trustee may remit the whole or part of any fee where it appears equitable to do so having regard to the nature and character of the estate or trust, the work in respect of which the fee is charged and the impact of the fee upon any beneficiary: art 7(2)(b) (substituted by SI 2003/690).

11 Public Trustee (Fees) Order, SI 1999/855, art 5. As to his power to commute fees see art 6. For an instance of a commutation (subsequently readjusted) see *Re Bentley, Public Trustee v Bentley* [1914] 2 Ch 456.

12 See the Public Trustee (Fees) Order 1999, SI 1999/855, art 4.

13 See *ibid* Pt II (arts 8-11) (as amended). See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 44.

14 See *ibid* art 31.

15 *Ibid* art 3. The following fees are paid out of income: (1) fees which the Public Trustee directs to be paid out of income by virtue of the Public Trustee (Fees) Act 1957 s 1(3) (see PARA 790 ante); (2) the administration fee in cases to which the Public Trustee (Fees) Order 1999, SI 1999/855, art 18 applies (see note 2 supra); (3) the insurance fee provided for by art 21 (see note 8 supra); (4) the income collection fee provided for by art 24 (see note 8 supra); (5) the management fees provided for by art 30 (see note 8 supra); (6) the value added tax fee provided for by art 31 (see the text and note 14 supra), in cases where the fee in respect of which the value added tax fee is payable is itself payable out of income: art 3.

## UPDATE

### 791 Particular fees payable

TEXT AND NOTES--SI 1999/855 replaced: Public Trustee (Fees) Order 2008, SI 2008/611.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/792. The Public Trustee.

#### **(iv) Custodian Trustees**

#### **792. The Public Trustee.**

Subject to rules under the Public Trustee Act 1906<sup>1</sup>, the Public Trustee may, if he consents to act as such<sup>2</sup>, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust<sup>3</sup>:

- 111 (1) by order of the court<sup>4</sup> made on the application of any person on whose application the court may order the appointment of a new trustee<sup>5</sup>; or
- 112 (2) by the testator, settlor or other creator of any trust<sup>6</sup>; or
- 113 (3) by the person having power to appoint new trustees<sup>7</sup>.

1 The Public Trustee may accept as custodian trustee any trust created or declared by any trust instrument other than trusts of any instrument made solely by way of security for money: Public Trustee Rules 1912, SR & O 1912/348, r 6(d), proviso. For the meaning of 'trust instrument' for these purposes see PARA 769 note 3 ante. As to the inability of the Public Trustee to accept any trusts exclusively for religious or charitable purposes see PARA 767 ante; and as to his power to act in a trust involving the management or carrying on of a business see PARA 767 ante.

2 In the case of the appointment of the Public Trustee by a testator, his subsequent consent, and, in every other case, his previous consent, to act is requisite: see *ibid* r 8(1), (2); and PARA 769 ante.

3 Public Trustee Act 1906 s 4(1). For the meaning of 'trust' see PARA 766 note 12 ante.

4 For the meaning of 'court' see PARA 662 note 9 ante.

5 Public Trustee Act 1906 s 4(1)(a). As to the appointment of new trustees generally see PARA 818 et seq post.

6 *Ibid* s 4(1)(b).

7 *Ibid* s 4(1)(c). As to the duty to notify the Public Trustee of his appointment by a testator, his right to require documents and information, and his duty to notify his consent or refusal see the Public Trustee Rules 1912, SR & O 1912/348, rr 8(3), 9, 10; and PARA 769 note 8 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/793. Other trust corporations.

### **793. Other trust corporations.**

The statutory provisions relating to custodian trustees<sup>1</sup> apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under the Public Trustee Act 1906<sup>2</sup> to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee<sup>3</sup>. Unlike the Public Trustee, such a company or corporation may act as custodian trustee of real, leasehold or personal estate devised or bequeathed exclusively for religious or charitable purposes<sup>4</sup>.

1     I.e. the Public Trustee Act 1906 s 4.

2     See the Public Trustee Rules 1912, SR & O 1912/348 (as amended); and PARA 794 post.

3     Public Trustee Act 1906 s 4(3). As to fees of the Public Trustee generally see PARAS 790-791 ante.

4     *Re Cherry's Trusts*, *Robinson v Wesleyan Methodist Chapel Purposes Trustees* [1914] 1 Ch 83. As to the inability of the Public Trustee to accept any trusts exclusively for religious or charitable purposes see PARA 767 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/794. Corporations entitled to act as custodian trustee.

## **794. Corporations entitled to act as custodian trustee.**

Any corporation may act as custodian trustee<sup>1</sup> which is:

- 114 (1) constituted under the law of the United Kingdom<sup>2</sup> or of any part of it, or under the law of any other member state of the European Community or any part of it<sup>3</sup>, and which is empowered by its constitution to undertake trust business<sup>4</sup>, has one or more places of business in the United Kingdom<sup>5</sup>, and is:
  - 5 6. (a) a company incorporated by special Act of Parliament or royal charter<sup>6</sup>; or
  7. (b) a company registered (with or without limited liability) under the Companies Act 1985<sup>7</sup> or under the Companies (Northern Ireland) Order 1986<sup>8</sup> or in another member state of the European Community, and having a capital (in stock or shares) for the time being issued of not less than £250,000 (or its equivalent in the currency of the state where the company is registered) of which not less than £100,000 (or its equivalent) has been paid up in cash<sup>9</sup>; or
  8. (c) a company registered without limited liability under the Companies Act 1985 or the Companies (Northern Ireland) Order 1986 or in another member state of the European Community and of which one of the members is a company within any of the classes defined above<sup>10</sup>;
- 6 115 (2) a corporation incorporated by special Act or royal charter<sup>11</sup> or under the Charities Act 1993<sup>12</sup> which is empowered by its constitution to act as a trustee for any charitable purposes, but only in relation to trusts in which its constitution empowers it to act<sup>13</sup>;
- 116 (3) a corporation constituted under the law of the United Kingdom or of any part of it and having its place of business there, and which is either<sup>14</sup>:
  - 7 9. (a) established for the purpose of undertaking trust business for the benefit of Her Majesty's navy, army, air force or civil service or of any unit, department, member or association of members of any one or more of those services, and having among its directors or members any persons appointed or nominated by the Defence Council or any department of state or any one or more of those departments<sup>15</sup>; or
  10. (b) authorised by the Lord Chancellor to act in relation to any charitable, ecclesiastical or public trusts as a trust corporation, but only in connection with any such trust as is so authorised<sup>16</sup>;
- 8 117 (4) a strategic health authority, health authority or special health authority or a preserved board<sup>17</sup>, but only in relation to any trust which the authority is authorised to accept<sup>18</sup>;
- 118 (5) the British Gas Corporation<sup>19</sup> or any subsidiary of it<sup>20</sup>, but only in relation to pension schemes or funds established or maintained by it<sup>21</sup>;
- 119 (6) the London Transport Executive<sup>22</sup>, but only in relation to a pension scheme or fund established or administered by it<sup>23</sup>;
- 120 (7) the Common Council of the City of London<sup>24</sup>, a London borough council<sup>25</sup>, a county council, district council, parish council or community council<sup>26</sup>, and the Council of the Isles of Scilly<sup>27</sup>, but only in relation to any property for the time being held upon any charitable or public trusts (other than trusts for an ecclesiastical

- charity or for a charity for the relief of poverty) for the benefit of the inhabitants of the area of the local authority concerned and its neighbourhood or of any part of that area<sup>28</sup>;
- 121 (8) a metropolitan district council or a non-metropolitan county council<sup>29</sup>, a London borough council<sup>30</sup>, the Common Council of the City of London<sup>31</sup> and the Council of the Isles of Scilly<sup>32</sup>, but only in relation to trusts for children in their care or persons occupying residential accommodation provided by them under the community care legislation<sup>33</sup>;
- 122 (9) the Coal Corporation or any subsidiary of it, but only in relation to certain schemes or arrangements<sup>34</sup>;
- 123 (10) a corporation acting as trustee of the trusts of any pension scheme or pension fund established or maintained by the British Broadcasting Corporation, but only in relation to those trusts<sup>35</sup>;
- 124 (11) any corporation appointed by the Secretary of State<sup>36</sup> as a trustee of a coal industry scheme<sup>37</sup> for purposes relating to pensions, gratuities or other like benefits and in relation to which provision is, or has been, made<sup>38</sup> for the scheme to continue in force<sup>39</sup>, but only in relation to such a scheme<sup>40</sup>.

The Treasury Solicitor may act as a custodian trustee<sup>41</sup>.

Where property is vested in the Official Custodian<sup>42</sup> in trust for a charity, he has as trustee of any property all the same powers, duties and liabilities, and is entitled to the same rights and immunities, and is subject to the same control and orders of the court, as a corporation appointed custodian trustee<sup>43</sup>, except that he has no power to charge fees<sup>44</sup>.

1 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(b) (r 30(1) substituted by SI 1975/1189; and renumbered by SI 1981/358).

2 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

3 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(b)(i) (as substituted and renumbered: see note 1 supra). See *Re Bigger* [1977] Fam 203, [1977] 2 All ER 644.

4 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(b)(ii) (as substituted and renumbered: see note 1 supra). For these purposes, 'trust business' means the business of acting as trustee under wills and settlements and as executor and administrator: r 30(1)(b)(ii) (as so substituted and renumbered).

5 Ibid r 30(1)(b)(iii) (as substituted and renumbered: see note 1 supra).

6 Ibid r 30(1)(b)(iv) (as substituted and renumbered: see note 1 supra). See also COMPANIES vol 14 (2009) PARA 1.

7 See COMPANIES vol 14 (2009) PARA 24 et seq.

8 *Ile the Companies (Northern Ireland) Order 1986*, SI 1986/1032.

9 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(b)(iv) (as substituted and renumbered: see note 1 supra); Interpretation Act 1978 s 17(2)(b).

10 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(b)(iv) (as substituted and renumbered: see note 1 supra); Interpretation Act 1978 s 17(2)(b). The capital may be vested in or held in trust for another company on an amalgamation: *Re Skinner* [1958] 3 All ER 273, [1958] 1 WLR 1043.

11 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1129.

12 See CHARITIES vol 8 (2010) PARAS 230, 260.

13 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(c) (as substituted and renumbered: see note 1 supra); Interpretation Act 1978 s 17(2)(b).



14 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(d) (as substituted and renumbered: see note 1 supra).

15 Ibid r 30(1)(d)(i) (as substituted and renumbered: see note 1 supra). See ARMED FORCES. As to the Defence Council see ARMED FORCES vol 2(2) (Reissue) PARA 2; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 443 et seq.

16 Ibid r 30(1)(d)(ii) (as substituted and renumbered: see note 1 supra). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq.

17 As to strategic health authorities and health authorities established under the National Health Service Act 1977 s 8 (as substituted) and special health authorities established under s 11 (as substituted) see HEALTH SERVICES vol 54 (2008) PARAS 94 et seq, 136 et seq. The preserved boards referred to in the text are those defined by the National Health Service Reorganisation Act 1973 s 15(6) (repealed).

18 See the Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(e) (as substituted and renumbered (see note 1 supra); and amended by SI 1984/109; SI 2002/2469).

19 The British Gas Corporation was dissolved on 28 February 1990 by the British Gas Corporation (Dissolution) Order 1990, SI 1990/147. As to the transfer of the undertaking of the British Gas Corporation to British Gas plc see the Gas Act 1986 s 49; and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 777.

20 For these purposes, 'subsidiary' has the same meaning as in the companies legislation (see the Companies Act 1985 s 736 (as substituted); and COMPANIES vol 14 (2009) PARA 25): see the Public Trustee Rules 1912, SR & O 1912/348, r 30(2) (added by SI 1981/358); and the Interpretation Act 1978 s 17(2)(b).

21 See the Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(f) (as substituted and renumbered (see note 1 supra); and amended by SI 1985/132).

22 Notwithstanding the repeal by the London Regional Transport Act 1984 of the provisions of the Transport (London) Act 1969 under which the London Transport Executive was established, the Executive continued to exist although it was known as London Regional Transport: see the London Regional Transport Act 1984 s 1(2) (repealed). Any functions of the London Transport Executive which, by virtue of the London Regional Transport Act 1984 s 67(1) (repealed) were exercisable by London Regional Transport are now exercisable by Transport for London: Greater London Authority Act 1999 s 301(1). See also LONDON GOVERNMENT.

23 See the Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(g) (as substituted and renumbered: see note 1 supra).

24 Ibid r 30(1)(h)(v) (added by SI 1976/836; and renumbered by SI 1981/358). As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51.

25 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(h)(ii) (as substituted and renumbered: see note 1 supra).

26 Ibid r 30(1)(h)(iii) (as substituted and renumbered: see note 1 supra).

27 Ibid r 30(1)(h)(iv) (as substituted and renumbered: see note 1 supra).

28 See ibid r 30(1)(h) (as substituted and renumbered: see note 1 supra).

29 Ibid r 30(1)(i)(i) (r 30(1)(i) added by SI 1976/836; and renumbered by SI 1981/358).

30 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(i)(ii) (as added and renumbered: see note 1 supra).

31 Ibid r 30(1)(i)(iii) (as added and renumbered: see note 1 supra).

32 Ibid r 30(1)(i)(iv) (as added and renumbered: see note 1 supra).

33 See ibid r 30(1)(i) (as added and renumbered: see note 1 supra). The community care legislation referred to in the text is the National Assistance Act 1948 s 21(1)(a) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029). A corporation acting as a custodian trustee by virtue of the Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(i) (as added and renumbered) in relation to any trust is entitled to continue to act in relation to that trust until a new custodian trustee is appointed, notwithstanding that the person concerned ceases to occupy such accommodation or to be in the care of that authority, as the case may be: r 30(1)(i) (as so added and renumbered).

34 See *ibid* r 30(1)(j) (added by SI 1981/358). The Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(j) (as added) refers to the National Coal Board which was renamed the British Coal Corporation: see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 2. The Corporation was dissolved on 27 March 2004: see the Coal Industry Act 1994 ss 23(2), 65(1), 68(3)(b); British Coal Corporation Order 2004, SI 2004/144, art 3. As to the establishment of the Corporation's successor body, the Coal Authority, see the Coal Industry Act 1994 s 1, Sch 1; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 52 et seq. As to the British Coal Corporation, and the restructuring of its undertaking, see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 72 et seq. The schemes or arrangements referred to in the text are those established under regulations made under the Coal Industry Nationalisation Act 1946 s 37 (amended by the Coal Industry Act 1949, s 4(3), the Coal Industry Act 1977 s 12(1) and the Coal Industry Act 1987 s 1(2), Sch 1 para 1). As from a day to be appointed the Coal Industry Nationalisation Act 1946 s 37 (as amended) is repealed by the Coal Industry Act 1994 s 67, Sch 11 Pt III. At the date at which this volume states the law no such day had been appointed.

35 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(k) (added by SI 1987/1891).

36 In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is one, and in law each Secretary of State is generally capable of performing the functions of all or any of them: see further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355. See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 4.

37 *Ie* any scheme having effect by virtue of regulations made under the Coal Industry Nationalisation Act 1946 s 37 (as amended; prospectively repealed): see note 34 *supra*.

38 *Ie* by regulations made under the Coal Industry Act 1994 s 22(1), Sch 5 para 2(1): see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 80 et seq.

39 *Ie* notwithstanding the prospective repeal by the Coal Industry Act 1994 of the Coal Industry Nationalisation Act 1946 s 37 (as amended; prospectively repealed) and of the enactments modifying it: see note 34 *supra*.

40 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(l) (added by SI 1994/2519).

41 Public Trustee Rules 1912, SR & O 1912/348, r 30(1)(a) (as substituted and renumbered: see note 1 *supra*). As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541.

42 As to the Official Custodian see CHARITIES vol 8 (2010) PARA 297 et seq.

43 *Ie* under the Public Trustee Act 1906 s 4: see PARA 792 et seq *ante*.

44 See the Charities Act 1993 s 22(1); and CHARITIES vol 8 (2010) PARA 301.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/795. Corporation may not be custodian trustee and managing trustee.

**795. Corporation may not be custodian trustee and managing trustee.**

A body corporate, although otherwise qualified to act as a custodian trustee, may not be appointed to be both a managing trustee and a custodian trustee of a trust instrument so as to enable the appointee to charge fees as a custodian trustee<sup>1</sup>. In such a case the whole of the attempted appointment is ineffective, and a person who would have been discharged from his trusteeship by an effective appointment remains a trustee<sup>2</sup>.

1 *Forster v Williams Deacon's Bank Ltd* [1935] Ch 359, CA. As to when a corporation is entitled to act as a custodian trustee see PARA 794 ante.

2 *Arning v James* [1936] Ch 158.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/796. Powers and duties of custodian trustee.

## **796. Powers and duties of custodian trustee.**

Where a custodian trustee of any trust is appointed<sup>1</sup>:

- 125 (1) the trust property must be transferred to him as if he were sole trustee<sup>2</sup>;
- 126 (2) the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust remain vested in the trustees other than the custodian trustee ('the managing trustees')<sup>3</sup>;
- 127 (3) as between himself and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee has the custody of all securities and documents of title relating to the trust property, but the managing trustees have free access to them and are entitled to take copies and extracts<sup>4</sup>;
- 128 (4) in determining the number of trustees for the purposes of the Trustee Act 1925, the custodian trustee is not to be reckoned as a trustee<sup>5</sup>;
- 129 (5) when exercisable by the trustees, the power of appointing new trustees is exercisable by the managing trustees alone, but the custodian trustee has the same power as any other trustee of applying to the court for the appointment of a new trustee as any other trustee<sup>6</sup>.

1 See the Public Trustee Act 1906 s 4(2). See also s 4(3); and PARA 793 ante.

2 Ibid s 4(2)(a). Vesting orders for the purpose may, where necessary, be made under the Trustee Act 1925 (see PARA 869 et seq post): Public Trustee Act 1906 s 4(2)(a); Interpretation Act 1978 s 17(2)(a). All sums payable to or out of the income or capital of the trust property must be paid to or by the custodian trustee; but he may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into the banking account of such person as they direct; and in that case he is exonerated from seeing to its application or being answerable for any loss or misapplication: Public Trustee Act 1906 s 4(2)(e).

3 Ibid s 4(2)(b). The custodian trustee must concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into court), unless the matter in which he is requested to concur is a breach of trust or involves a personal liability on him in respect of calls or otherwise; but unless he so concurs, he is not liable for any act or default on the part of the managing trustees or any of them: s 4(2)(d). If the custodian trustee acts in good faith, he is not liable for accepting as correct, and acting upon the faith of, any written statement by the managing trustees as to any birth, death, marriage or other matter of pedigree or relationship, or other matter of fact upon which the title to the trust property or any part of it may depend, or for acting upon legal advice obtained by the managing trustees independently of him: s 4(2)(h).

4 Ibid s 4(2)(c).

5 Ibid s 4(2)(g).

6 Ibid s 4(2)(f).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/ (iv) Custodian Trustees/797. Determination of custodian trusteeship.

### **797. Determination of custodian trusteeship.**

On the application of either the custodian trustee or any of the managing trustees<sup>1</sup> or of any beneficiary, and on proof to the satisfaction of the court that the termination of the custodian trusteeship is the general wish of the beneficiaries or is on other grounds expedient, the court<sup>2</sup> may make an order for that purpose and may thereupon make such vesting orders and give such directions as under the circumstances may seem to the court to be necessary or expedient<sup>3</sup>.

1 The application is made to a Chancery judge sitting in private (see CPR Sch 1 RSC Ord 93 r 2) and should be made by the Part 8 procedure. As to High Court procedure generally see PARA 776 ante. As to the Part 8 procedure see CPR Pt 8; para 643 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq. For the meaning of 'the managing trustees' see PARA 796 ante.

2 For the meaning of 'court' see PARA 662 note 9 ante.

3 See the Public Trustee Act 1906 s 4(2)(i). Where it is desired to appoint a custodian trustee to be managing trustee, the custodian trusteeship must first be terminated: *Re Squire's Settlement* [1946] WN 11.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/798. Meaning of 'trust corporation'.

## **(v) Trust Corporations**

### **798. Meaning of 'trust corporation'.**

For the purposes of certain Acts comprised in the 1925 property legislation, 'trust corporation' means the Public Trustee<sup>1</sup> or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under the Public Trustee Act 1906<sup>2</sup> to act as custodian trustee<sup>3</sup>, and includes certain other persons and corporations<sup>4</sup>.

1 As to the Public Trustee see PARA 766 et seq ante.

2 See the Public Trustee Act 1906 s 4(3); and PARAS 792-793 ante.

3 See the Settled Land Act 1925 s 117(1)(xxx) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(13)(b)); the Trustee Act 1925 s 68(1) PARA (18); the Law of Property Act 1925 s 205(1)(xxviii); and the Administration of Estates Act 1925 s 55(1)(xxvi). See also the Supreme Court Act 1981 s 128; and the Land Registration Rules 2003, SI 2003/1417, r 217. See further EXECUTORS AND ADMINISTRATORS. Where there exists a legal entity, it may be a trust corporation even though its capital is vested in or held in trust for another company on an amalgamation: *Re Skinner*[1958] 3 All ER 273, [1958] 1 WLR 1043. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

4 For the purpose of the Acts cited in note 3 supra, the definition of 'trust corporation' has been enlarged to include the Treasury Solicitor (including the solicitor for the affairs of the Duchy of Lancaster), the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor, and, in relation to the property of a bankrupt and property subject to a deed of arrangement, the trustee in bankruptcy and the trustee under the deed respectively, and, in relation to charitable, ecclesiastical and public trusts, any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part of it which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part of that income by way of profits among any of its members, and is authorised by him to act in relation to such trusts as a trust corporation: see the Law of Property (Amendment) Act 1926 s 3(1) (amended by the Supreme Court Act 1981 s 152(1), Sch 5). The definition of 'trust corporation' has been further enlarged so that the reference to a corporation appointed by the court in any particular case to be a trustee includes a reference to a corporation appointed by the Charity Commission under the Charities Act 1993 to be a trustee: see s 35 (amended by the Charities Act 2006 s 75(1), Sch 8 paras 96, 127). For the purposes of the Settled Land Act 1925, the Trustee Act 1925, the Law of Property Act 1925, the Administration of Estates Act 1925 and the Land Registration Act 2002 the Church of England Pensions Board is a trust corporation (see the Clergy Pensions Measure 1961 s 31), and it is apprehended that this is also the case for the purposes of the Supreme Court Act 1981 (see the Interpretation Act 1978 s 17(2)(a)). As to the prospective renaming of the Supreme Court Act 1981 see note 3 supra. As to the Treasury Solicitor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 541; as to the Official Solicitor see COURTS vol 10 (Reissue) PARA 667; and as to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq. For the meaning of 'United Kingdom' see PARA 767 note 17 ante. As to the Charity Commission see CHARITIES vol 8 (2010) PARAS 538-572; and as to the Church of England Pensions Board see ECCLESIASTICAL LAW.

## **UPDATE**

### **798 Meaning of 'trust corporation'**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/799. Special powers of trust corporations.

### **799. Special powers of trust corporations.**

A trust corporation<sup>1</sup> has certain powers which are not exercisable by a sole trustee, not being a trust corporation, namely:

- 130 (1) power to give a valid receipt for, or direct the application of, the proceeds of sale or capital moneys arising under a trust of land<sup>2</sup>;
- 131 (2) power to give a valid receipt for capital moneys arising under the Settled Land Act 1925<sup>3</sup>; and
- 132 (3) power unaffected by the restrictions imposed in regard to receipts by sole trustees to effect a compromise or other transaction<sup>4</sup>.

1 For the meaning of 'trust corporation' see PARA 798 ante.

2 See the Law of Property Act 1925 s 27(2) (substituted by the Law of Property (Amendment) Act 1926 s 7, Schedule; and amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(8)). See also SALE OF LAND vol 42 (Reissue) PARAS 91, 312; SETTLEMENTS vol 42 (Reissue) PARAS 900, 906.

3 See the Settled Land Act 1925 ss 94, 95; and SALE OF LAND vol 42 (Reissue) PARA 312; SETTLEMENTS vol 42 (Reissue) PARAS 753, 786. Cf para 822 post.

4 See the Trustee Act 1925 s 15 (as amended); and PARA 1052 post. As to the overreaching effect of a conveyance under a trust of land where the trustee is a trust corporation see REAL PROPERTY vol 39(2) (Reissue) PARA 249; as to payments of capital money to a trust corporation on a disposition of settled land where the trustees of the settlement have not been discharged see SETTLEMENTS vol 42 (Reissue) PARA 712; and as to the power of a trust corporation to act as executor or administrator see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 18.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/800. Provisions for remuneration.

## 800. Provisions for remuneration.

Where a settlor or testator appoints a trust corporation<sup>1</sup>, other than the Public Trustee<sup>2</sup>, to be a trustee of a trust instrument, he usually inserts a clause providing for the remuneration of the trust corporation in respect of its services according to a scale specified, either expressly or referentially, in the trust instrument. Where this is done, the remuneration of the trustee is expressly provided for, and, except as regards the incidence of the burden, cannot be disputed by the beneficiaries<sup>3</sup>. The scale of remuneration usually provides for an acceptance fee, an income fee and a distribution fee<sup>4</sup>, and, where the trust corporation is a bank, for certain other privileges as respects, for example, trust money and bank charges. In the absence of any provision about his entitlement to remuneration, in the trust instrument or under any enactment or subordinate legislation<sup>5</sup>, a trustee who is a trust corporation<sup>6</sup> is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides to or on behalf of the trust<sup>7</sup>. A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee<sup>8</sup>.

1 For the meaning of 'trust corporation' see PARA 798 ante.

2 As to the Public Trustee see PARA 766 et seq ante.

3 In *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054, where a bank was appointed executor, its charging clause, after providing that the bank was to be entitled to remuneration, went on to say that the bank might 'without accounting for any resultant profit act as attorney and perform any service on behalf of any estate on the same terms as would be made with a customer'; and the bank was held to be under no duty to account for the profit gained by its employment of money deposited with it. In an exceptional case the court may be asked under its inherent jurisdiction to authorise an increase in the scale of remuneration: *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA.

4 The fees chargeable and the incidents upon which they are chargeable are generally fixed at a rate which does not exceed that applicable to the Public Trustee: see PARAS 790-791 ante.

5 See the Trustee Act 2000 s 29(5). As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

6 This provision excludes any trust corporation which is a trustee of a charitable trust: *ibid* s 29(1)(b).

7 *Ibid* s 29(1). Reasonable remuneration means such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee and for the purposes of s 29(1) includes, in relation to the provision of services by a trustee who is an authorised institution under the Banking Act 1987 and provides the services in that capacity, the institution's reasonable charges for the provision of such services: Trustee Act 2000 s 29(3). A trustee is entitled to remuneration under s 29 even if the services in question are capable of being provided by a lay trustee: s 29(4). Section 29 also applies to a trustee who has been authorised to exercise functions as an agent of the trustees, or to act as a nominee or custodian: s 29(6). See also PARA 932 post.

8 *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 at 1055 per Harman J; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167 (but see *Jobson v Palmer* [1893] 1 Ch 71 at 76 per Romer J). See also the statutory duty of care which applies to trustees under the Trustee Act 2000 ss 1, 2, Sch 1 (see PARA 950 post).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/801. When remuneration is allowable by the court.

**801. When remuneration is allowable by the court.**

Where a trust corporation<sup>1</sup>, other than the Public Trustee<sup>2</sup>, is appointed by the court<sup>3</sup> to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit<sup>4</sup>.

1 For the meaning of 'trust corporation' see PARA 798 ante.

2 As to the Public Trustee see PARA 766 et seq ante.

3 See PARA 632 et seq ante.

4 Trustee Act 1925 s 42. As to the allowance of remuneration where a trust corporation is appointed administrator of a deceased's estate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 44.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/802. Incidence of remuneration.

## 802. Incidence of remuneration.

Where a trust corporation<sup>1</sup> is appointed an executor and trustee by a testator and given power to charge, it seems that the acceptance fee is chargeable against residue as an administration expense<sup>2</sup>.

As between an annuity, whether or not given as a clear sum, and residue, the income fee is in general chargeable against residue<sup>3</sup>, whether it is to be regarded as an administration expense<sup>4</sup> or as a legacy to the corporation<sup>5</sup>; and, as between a settled legacy and residue, the income fee is an expense in connection with the income of the settled legacy and is payable out of that<sup>6</sup>. Where, however, a gift takes the form of a direction to set aside and invest in respect of an annuity such a sum as will produce a specified annual sum, then, whether or not the fund will ultimately fall into residue, the sum to be set aside must be such as will produce the income fee in addition to the specified annual sum, and the income fee is payable out of the income of the fund so set aside<sup>7</sup>.

A withdrawal fee is an expense incurred in relation to the final distribution of a fund and is payable out of the corpus of that fund<sup>8</sup>. For example, the corpus of a settled legacy must bear its own withdrawal fee in exoneration of residue, the liability for which ceases when a fund is set apart to answer the legacy<sup>9</sup>. Where a fund directed to be set aside to provide an annuity ultimately falls into residue, the withdrawal fee is payable out of the residuary estate, but, if the fund does not fall into residue, the withdrawal fee is payable out of the fund<sup>10</sup>.

Where a trust corporation becomes a trustee otherwise than by its appointment as an original trustee, a withdrawal fee is payable out of the corpus of the fund to be distributed<sup>11</sup>. Where a trust corporation is appointed after funds have been appropriated to answer annuities, it seems that the income fee in respect of the annuities will be ordered to be paid out of the income of the appropriated funds which will be ordered, if necessary, to be augmented for the purpose<sup>12</sup>. The incidence of the acceptance fee, if any, in a case where a trust corporation is appointed otherwise than as an original trustee remains to be determined, although it seems likely that capital will bear the fee<sup>13</sup>.

1 For the meaning of 'trust corporation' see PARA 798 ante.

2 See *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518 (where, however, the residuary legatees ultimately admitted the liability of residue for the acceptance fee).

3 *Re Hulton, Midland Bank Executor and Trustee Co Ltd v Thompson* [1936] Ch 536, [1936] 2 All ER 207 (where the gift was of a clear yearly sum of £12,000 after paying or deducting income tax and surtax and a trust company was appointed); *Re Riddell, Public Trustee v Riddell* [1936] Ch 747, [1936] 2 All ER 1600 (where annuities were given simpliciter and the Public Trustee (see PARA 766 et seq ante) was appointed, and the decision of Astbury J in *Re Bentley, Public Trustee v Bentley* [1914] 2 Ch 456 was not followed); *Re Evans' Will Trusts, Public Trustee v Gausby* [1948] Ch 185, [1948] 1 All ER 381 (where fees were provided by the augmentation of annuity funds from other money in hand).

4 *Re Riddell, Public Trustee v Riddell* [1936] Ch 747 at 749, [1936] 2 All ER 1600 at 1064 per Farwell J; *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341 at 346, [1938] 1 All ER 287 at 291 per Farwell J.

5 It was argued that it was a legacy in *Re Hulton, Midland Bank Executor and Trustee Co Ltd v Thompson* [1936] Ch 536, [1936] 2 All ER 207 (where Clauson J held that in either event it was payable out of residue).

6 *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 434.

7 *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341, [1938] 1 All ER 287. This follows from the testator's provision for the remuneration of the trustee and his decision to leave to his executors the duty of determining the sum to be set aside, and no express provision in this respect is needed: *Re Godwin, Coutts & Co v Godwin* supra at 349 and 293 per Farwell J.

8 *Re Hicklin, Public Trustee v Hoare* [1917] 2 Ch 278 at 284-285; *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518; *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341, [1938] 1 All ER 287.

9 *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274 at 277-278, [1937] 1 All ER 518 at 521; *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341 at 345-346, [1938] 1 All ER 287 at 290-291.

10 *Re Godwin, Coutts & Co v Godwin* [1938] Ch 341, [1938] 1 All ER 287.

11 See *Re Hicklin, Public Trustee v Hoare* [1917] 2 Ch 278 (where the Public Trustee was appointed to fill a vacancy in the trusteeship).

12 See *Re Evans' Will Trusts, Public Trustee v Gausby* [1948] Ch 185, [1948] 1 All ER 381 (where the Public Trustee had been appointed and recourse was ordered to be made to the capital of the augmented funds in so far as the income might prove insufficient to meet the annuities and income fees). As to the incidence between capital and income of the fees of the Public Trustee see PARAS 790-791 ante.

13 Cf *Re Roberts' Will Trusts, Younger v Lewins* [1937] Ch 274, [1937] 1 All ER 518. Where the appointment is made and the remuneration is allowed by the court, the order will presumably deal with the incidence of the fees where there are funds held on different trusts.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(1) KINDS OF TRUSTEES/(v) Trust Corporations/803. Power to receive notices.

### **803. Power to receive notices.**

By any settlement or other instrument creating a trust, a trust corporation<sup>1</sup> may be nominated to whom notices of dealings affecting real or personal property may be given and, in default of such nomination, the trustees, if any, of the instrument or, on the application of any person interested, the court may make the nomination<sup>2</sup>. Where a trust corporation is so nominated, any instrument on which notices under the statutory provisions relating to the priority of dealings with equitable interests<sup>3</sup> may be indorsed<sup>4</sup> must be indorsed with the name of that trust corporation by the person having the possession or custody of the instrument<sup>5</sup>. Notice given to any trust corporation whose name is so indorsed operates in the same way as a notice or indorsement under those statutory provisions<sup>6</sup>; and, where a trust corporation is so acting, a notice given to a trustee of the trust instrument of a dealing relating to the trust property must forthwith be delivered or sent by post by the trustee to the trust corporation and, until received by the corporation, does not affect any priority<sup>7</sup>.

A trust corporation must not be nominated for the above purposes unless it consents to act<sup>8</sup>, or where it has any beneficial interest in or charge upon the trust property<sup>9</sup>, or where a trust corporation is acting as the trustee or one of the trustees of the instrument creating the trust<sup>10</sup>. Where a trust corporation acting for the above purposes becomes entitled to any beneficial interest in or charge upon the trust property, another trust corporation must be nominated in its place<sup>11</sup>.

A trust corporation so acting is bound to keep a separate register of notices of dealings with each equitable interest and must enter in the register the date of the notice, the name of the person giving the notice, and short particulars of the equitable interest intended to be affected and of the effect of the dealing if mentioned in the notice<sup>12</sup>. The trust corporation may require the applicant to pay a fee not exceeding the prescribed fee<sup>13</sup> before making an entry in the register<sup>14</sup>; and, subject to payment of a fee not exceeding the prescribed fee, the trust corporation must permit any person who, if the corporation had been the trustee of the trust instrument, would have been entitled to inspect notices served on the trustee<sup>15</sup> to inspect and take copies of the register and any notices held by it<sup>16</sup>, and must reply to all inquiries respecting notices received by it in like manner and in the same circumstances as if it had been a trustee of the trust instrument<sup>17</sup>.

1 For the meaning of 'trust corporation' see PARA 798 ante.

2 Law of Property Act 1925 s 138(1).

3 *Ibid* s 137 (as amended): see CHOSER IN ACTION vol 13 (2009) PARA 45 et seq; SALE OF LAND vol 42 (Reissue) PARA 320; SETTLEMENTS vol 42 (Reissue) PARA 610.

4 See *ibid* s 137(4); and CHOSER IN ACTION vol 13 (2009) PARA 53.

5 *Ibid* s 138(2).

6 *Ibid* s 138(3). See further CHOSER IN ACTION vol 13 (2009) PARA 45 et seq.

7 *Ibid* s 138(4).

8 *Ibid* s 138(5)(a).

9 Ibid s 138(5)(b).

10 Ibid s 138(5)(c).

11 Ibid s 138(6). All documents relating to notices affecting the trust must be delivered to the corporation so nominated: s 138(6).

12 Ibid s 138(7).

13 For these purposes, 'prescribed fee' means the fee prescribed by the Lord Chancellor, in cases where the Public Trustee acts as a trust corporation for the purposes of *ibid* s 138 (as amended): s 138(11) (amended by Public Trustee (Liability and Fees) Act 2002 s 2(2)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 477 et seq; and as to the Public Trustee see PARA 766 et seq.

14 Law of Property Act 1925 s 138(8).

15 See *ibid* ss 137(8), 138(9); and PARA 964 post.

16 Ibid s 138(9).

17 Ibid s 138(10).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(i) Constitution and Devolution of Trusteeship/A. ASSUMPTION OF OFFICE/804. Limitation of number of trustees.

## **(2) APPOINTMENT OF TRUSTEES**

### **(i) Constitution and Devolution of Trusteeship**

#### **A. ASSUMPTION OF OFFICE**

#### **804. Limitation of number of trustees.**

In the case of settlements<sup>1</sup> of land<sup>2</sup> and dispositions creating trusts of land<sup>3</sup> made or coming into operation after 31 December 1925, the number of trustees must not in any case exceed four; and, where more than four persons are named as trustees, the four first named who are able and willing to act are alone the trustees<sup>4</sup>.

These restrictions apply only to settlements and dispositions of land and do not apply: (1) in the case of land vested in trustees for charitable, ecclesiastical or public purposes<sup>5</sup>; or (2) where the net proceeds of the sale of the land are held for like purposes<sup>6</sup>; or (3) to trustees of a term of years absolute limited by a settlement on trusts for raising money<sup>7</sup> or of a like term created under the statutory remedies<sup>8</sup> relating to annual sums charged on land<sup>9</sup>.

Although a sole trustee of land is not forbidden, a sole trustee (not being a trust corporation) cannot give a valid receipt for the proceeds of sale or other capital money arising under a trust of land or for capital money arising under the Settled Land Act 1925<sup>10</sup>.

1 For these purposes, 'settlement' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 678): Trustee Act 1925 s 68(1) PARA (15).

2 For the meaning of 'land' see PARA 605 note 5 ante.

3 For the meaning of 'trust of land' as defined by the Trusts of Land and Appointment of Trustees Act 1996 see PARA 605 note 5 ante.

4 Trustee Act 1925 s 34(2)(a) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(9)). The other persons named do not become trustees unless appointed on the occurrence of a vacancy: Trustee Act 1925 s 34(2)(a) (as so amended). As to the appointment of new trustees see PARA 822 post.

5 Ibid s 34(3)(a).

6 Ibid s 34(3)(b).

7 See SETTLEMENTS vol 42 (Reissue) PARA 727 et seq.

8 See the Law of Property Act 1925 s 121(4); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 874-875.

9 Trustee Act 1925 s 34(3)(c).

10 See ibid s 14(2) (as amended); and PARA 1051 post. See also the Law of Property Act 1925 s 27(2) (as substituted and amended); the Settled Land Act 1925 s 18(1); and SALE OF LAND vol 42 (Reissue) PARA 312; SETTLEMENTS vol 42 (Reissue) PARA 786.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(i) Constitution and Devolution of Trusteeship/A. ASSUMPTION OF OFFICE/805. Modes in which trustees are constituted.

## **805. Modes in which trustees are constituted.**

A person is legally constituted a trustee who:

- 133 (1) is originally designated as such by the instrument creating the trust<sup>1</sup>, or is duly appointed as such under a power for the purpose contained in that instrument or under a statutory power for the purpose or by a court of competent jurisdiction or, in the case of a charitable trust, by the Charity Commission or under a legally established scheme<sup>2</sup>; and
- 134 (2) accepts the trust either expressly or by acting in the execution of it<sup>3</sup>.

A person may also be constituted a trustee by statute, in which case acceptance of the trust is not essential unless required by statute<sup>4</sup>. A person who is not legally constituted trustee becomes in equity a constructive trustee<sup>5</sup>:

- 135 (a) where, for want of a legally constituted trustee, trust property becomes in law vested in him<sup>6</sup>; or
- 136 (b) where he has acquired trust property in circumstances which in equity are deemed to require him to hold it upon the trust to which it was subject when he acquired it<sup>7</sup>; or
- 137 (c) where he intermeddles with and acts as trustee in relation to trust property, in which case he is also called a trustee de son tort<sup>8</sup>.

1 As to appointment by the creator of the trust see PARA 806 post. As to trustees of charities, and as to the Official Custodian for Charities, see CHARITIES vol 8 (2010) PARA 297 et seq. As to incorporated church trustees of a parish see ECCLESIASTICAL LAW vol 14 paras 1255-1256. As to the invalidity of the appointment of a minor as a trustee see PARA 609 ante.

2 As to the powers to appoint trustees see PARA 818 post. As to trustees in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 316 et seq.

3 As to acceptance and disclaimer of office see PARA 808 et seq post.

4 For instances of trusts imposed by statute see PARA 624 ante.

5 As to constructive trusts see PARA 687 et seq ante; and as to the failure of the original appointment of a trustee see PARA 816 et seq post.

6 As to the failure of trustees see PARA 807 post.

7 As to the stranger as constructive trustee generally see PARA 698 et seq ante.

8 As to intermeddling with a trust see PARA 698 ante.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(i) Constitution and Devolution of Trusteeship/A. ASSUMPTION OF OFFICE/806. Express or implied appointment by creator of trust.

### **806. Express or implied appointment by creator of trust.**

An original trustee is generally appointed by the creator of the trust either expressly<sup>1</sup> or impliedly<sup>2</sup>.

<sup>1</sup> *Milroy v Lord* (1862) 4 De GF & J 264 at 274 per Turner LJ; *Re Waidanis, Rivers v Waidanis* [1908] 1 Ch 123, CA. See also PARA 649 ante.

<sup>2</sup> As to express trusts and the certainty of intention see PARA 649 et seq ante.

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## 807. Failure of trustees.

Trusts do not fail by a failure of trustees<sup>1</sup> except that, if it is of the essence of a trust that the trustees selected by the settlor and no-one else are to act as the trustees and those trustees cannot or will not undertake the office, the trust must fail<sup>2</sup>. In the case of a trust created by a will, where no trustee is effectually appointed by the testator<sup>3</sup>, or all the trustees appointed by him die or refuse to accept the trust<sup>4</sup> before the trust takes effect, the person in whom the trust property is vested by reason of the failure of appointment, death or refusal is deemed in equity to be the trustee of the property for the purposes of the trust<sup>5</sup>. However, in such an event, if there is any procedure for the appointment of new trustees which is applicable to the case, it can be resorted to for the appointment of an original trustee<sup>6</sup>, and, if that procedure is not applicable or is not resorted to, a court of equity will appoint an original trustee<sup>7</sup>.

In the case of a voluntary trust purported to be created inter vivos, however, there can be no valid trust if the document relied upon as constituting the trust is a purported conveyance or transfer to trustees who are not named or otherwise identified, or who are already dead, or have otherwise ceased to exist or are not capable grantees. Such a document would be a nullity and completely ineffective to constitute a trust. But once the trust is completely constituted, it is another matter. Accordingly, where there is a conveyance or transfer to named persons in being, a trust is validly created notwithstanding an effective disclaimer by the trustees. The conveyance or transfer is valid until disclaimer: the effect of the disclaimer is to revest the trust property in the settlor or his personal representatives, if he is dead, subject to the trusts<sup>8</sup>.

1 *Ellison v Ellison* (1802) 6 Ves 656 at 663 per Lord Eldon LC; *Brown v Higgs* (1803) 8 Ves 561 at 570 per Lord Eldon LC.

2 *Re Lysaght, Hill v Royal College of Surgeons* [1966] Ch 191 at 207, [1965] 2 All ER 888 at 896; and see *Harris v Sharp* (21 March 1987) Lexis, CA, discussed in [1988] Conv 288. See also *Re Willis, Shaw v Willis* [1921] 1 Ch 44, CA; *Re Armitage, Elam v Norwich Corp'n* [1972] Ch 438, [1972] 1 All ER 708.

3 *Bennet v Davis* (1725) 2 P Wms 316; *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81; *A-G v Stephens* (1834) 3 My & K 347.

4 As to the failure of the original appointment of trustees see PARA 816 et seq post.

5 *Pits v Pelham* (1670) 1 Lev 304, HL; *Mallot v Wilson* [1903] 2 Ch 494 at 502-503.

6 As to such appointment and the procedures involved see PARAS 823, 831 et seq post.

7 *Moggridge v Thackwell* (1803) 7 Ves 36 at 84-85 per Lord Eldon LC; *A-G v Stephens* (1834) 3 My & K 347 at 352; *Tempest v Lord Camoys* (1866) 35 Beav 201; *Dodkin v Brunt* (1868) LR 6 Eq 580; *Jones v Jones* (1874) 31 LT 535. See also PARA 849 et seq post. The individuals named as trustees by the testator who creates a trust are only the nominal instruments to execute his intention that the trust is to be performed. If they fail either by death or by being under disability to act or refusing to act, or if no trustees are appointed at all, and the defect cannot otherwise be supplied, the office is in the first instance assumed by a court of equity of competent jurisdiction, which will take care that trustees are appointed to execute the trust: *A-G v Lady Downing* (1767) Wilm 1 at 24, 30 per Wilmot CJ; *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 127 per Arden MR; *Brown v Higgs* (1803) 8 Ves 561 at 570 per Lord Eldon LC; *Siggers v Evans* (1855) 5 E & B 367 at 374 per Crompton J; *Dodkin v Brunt* supra.

8 See *Siggers v Evans* (1855) 5 E & B 367; *Standing v Bowring* (1885) 31 ChD 282, CA; *London and County Banking Co Ltd v London and River Plate Bank Ltd* (1888) 21 QBD 535, CA. In *Dewar v Dewar* [1975] 2 All ER 728, [1975] 1 WLR 1532, it was held that a statement by the donee that he would only accept it as a loan did not prevent it from being an effective gift unless the donor agreed that it should be a loan (*Hill v Wilson* (1873) 8 Ch App 888 to the contrary not cited).

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## **B. ACCEPTANCE AND DISCLAIMER OF OFFICE**

### **808. Acceptance of office and vesting of property.**

A person who is appointed a trustee assumes the office upon his acceptance<sup>1</sup>. The acceptance may be either express or implied<sup>2</sup>. Upon acceptance, the trust property, so far as transferred to him, vests in him indefeasibly<sup>3</sup> and he cannot afterwards disclaim the trust<sup>4</sup>.

<sup>1</sup> Shep Touch 284-285; *Bonifaut v Greenfield* (1587) Cro Eliz 80; *Thompson v Leach* (1690) 2 Vent 198 at 199; *Townson v Tickell* (1819) 3 B & Ald 31. See also *Doyle v Blake* (1804) 2 Sch & Lef 231 at 239; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 23.

<sup>2</sup> *Lord Montford v Lord Cadogan* (1816) 19 Ves 635 at 638 per Lord Eldon LC; *Montgomery v Johnson* (1848) 11 I Eq R 476.

<sup>3</sup> A person must give his assent before any interest in property can indefeasibly pass to him (*Townson v Tickell* (1819) 3 B & Ald 31 at 39 per Best J; *Hill v Wilson* (1873) 8 Ch App 888), but a transfer or other disposition of property to a person without his knowledge vests the property in him at once, subject to his right to disclaim the property when informed of it (*Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520 per Parke B; *Siggers v Evans* (1855) 5 E & B 367 at 381; *Standing v Bowring* (1885) 31 ChD 282 at 288, CA, per Cotton LJ; *Mallott v Wilson* [1903] 2 Ch 494).

<sup>4</sup> *Re Sharman's Will Trusts, Public Trustee v Sharman* [1942] Ch 311, [1942] 2 All ER 74. See also *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520, 524. As to disclaimer see PARA 812 et seq post.

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### **809. Express acceptance.**

A person expressly accepts the office of trustee by executing the instrument of trust in which he is named a trustee<sup>1</sup>, or may do so by some other writing or orally<sup>2</sup>. However, an oral expression of acceptance does not bind him unless it is unequivocal<sup>3</sup>.

1 *Lord Montford v Lord Cadogan* (1816) 19 Ves 635 at 638; *Jones v Higgins* (1866) LR 2 Eq 538 at 543-544 per Kindersley V-C.

2 *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 519, 524; *Middleton v Pollock, ex p Elliott* (1876) 2 ChD 104; *Middleton v Pollock, ex p Wetherall* (1876) 4 ChD 49. Where a person did nothing to accept the trusts of a settlement except signing, many years afterwards, a memorandum indorsed upon it which related only to part of the settled property, he was held liable as a trustee in respect of that part of the property only: *Malzy v Edge* (1856) 2 Jur NS 80. As to inability to disclaim part of a trust see PARA 812 post.

3 *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 524.

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## **810. Implied acceptance.**

A person impliedly accepts the office of trustee if he personally interferes with the trust property<sup>1</sup> or otherwise acts in the trust<sup>2</sup> or allows proceedings in reference to the trust property to be instituted<sup>3</sup> or dealings with the trust property to be carried on<sup>4</sup> in his name. A person who is named an executor and trustee in a will is deemed, if he proves the will<sup>5</sup>, to accept the trusts of the will both as to personal property<sup>6</sup> and as to real property<sup>7</sup>.

1 *Lord Montford v Lord Cadogan* (1816) 19 Ves 635 at 638 per Lord Eldon LC; *Bence v Gilpin* (1868) LR 3 Exch 76 at 81 per Kelly CB.

2 *Doyle v Blake* (1804) 2 Sch & Lef 231; *Urch v Walker* (1838) 3 My & Cr 702; *James v Frearson* (1842) 1 Y & C Ch Cas 370; *White v Barton* (1854) 18 Beav 192. See also *Robinson v Pett* (1734) 3 P Wms 249. A release of the trust property to the other trustees implies a disclaimer and not an acceptance of the trust: see *Nicloson v Wordsworth* (1818) 2 Swan 365 at 371 per Lord Eldon LC; and PARA 812 note 8 post.

3 *Lord Montford v Lord Cadogan* (1816) 19 Ves 635; *Cook v Fryer* (1842) 1 Hare 498.

4 *James v Frearson* (1842) 1 Y & C Ch Cas 370.

5 *Re Sharman's Will Trusts, Public Trustee v Sharman* [1942] Ch 311, [1942] 2 All ER 74. As to proving a will see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 72 et seq.

6 *Mucklow v Fuller* (1821) Jac 198; *Booth v Booth* (1838) 1 Beav 125.

7 *Ward v Butler* (1824) 2 Mol 533.

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**811. When acceptance is not implied.**

Acceptance of a trust is not implied from the trustee named in a deed merely taking charge of the deed temporarily for safekeeping<sup>1</sup> or from acts in connection with the trust subsequent to his actual disclaimer or refusal of that trust<sup>2</sup>.

1 *Evans v John* (1841) 4 Beav 35 at 36-37 per Lord Langdale MR.

2 As to the effect of disclaimer generally see PARA 814 post.

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## 812. Disclaimer of office.

A person who is appointed a trustee may, before he has accepted the office or in any way acted in the trust<sup>1</sup>, disclaim the office or refuse to serve<sup>2</sup>. He may not, however, disclaim the office and retain the estate<sup>3</sup>; nor may he disclaim the trust as to part of the property, even when the property attempted to be disclaimed is in a different country from the rest<sup>4</sup>. The disclaimer involves disclaimer of any benefit annexed to the office<sup>5</sup> but does not prevent acceptance of an independent benefit conferred by the instrument of trust<sup>6</sup>.

No formal act or instrument is necessary to effect the disclaimer or refusal<sup>7</sup>; but in order to furnish evidence of the fact and to render it impossible for the person subsequently either to assume to act or to be charged with acting as a trustee, a disclaimer by deed is convenient and proper<sup>8</sup>.

A trustee who has refused to act in a trust but has not executed a deed of disclaimer may, in legal proceedings in relation to the trust, disclaim in court<sup>9</sup>.

Where a testator has appointed a person an executor and also a trustee, the fact of his renouncing probate and not acting as trustee is strong evidence that he has refused the trust<sup>10</sup>, and is conclusive evidence of refusal if the duties of executor are by the will inseparable from the duties of the trust<sup>11</sup>.

1 As to express acceptance of office see PARA 809 ante; and as to implied acceptance see PARA 810 ante.

2 *Smith v Wheeler* (1671) 1 Vent 128 at 130 per Hale CJ; *Nicloson v Wordsworth* (1818) 2 Swan 365 at 369 per Lord Eldon LC; *Small v Marwood* (1829) 9 B & C 300 at 309; *Siggers v Evans* (1855) 5 E & B 367 at 381; *White v M'Dermott* (1872) IR 7 CL 1. This applies equally to trustees by devolution: *Legg v Mackrell* (1860) 2 De GF & J 551; *Re Ridley, Ridley v Ridley* [1904] 2 Ch 774; *Re Benett, Ward v Benett* [1906] 1 Ch 216, CA.

3 *Re Martinez' Trusts* (1870) 22 LT 403.

4 *Re Lord and Fullerton's Contract* [1896] 1 Ch 228, CA.

5 *Slaney v Watney* (1866) LR 2 Eq 418; *Lewis v Mathews* (1869) LR 8 Eq 277.

6 *Pollexfen v Moore* (1745) 3 Atk 272; *Andrew v Trinity Hall, Cambridge* (1804) 9 Ves 525 at 534; *Talbot v Earl of Radnor* (1834) 3 My & K 252; *Warren v Rudall, ex p Godfrey* (1860) 1 John & H 1.

7 *Townson v Tickell* (1819) 3 B & Ald 31 at 39 per Holroyd J; *Stacey v Elph* (1833) 1 My & K 195 at 199 per Leach MR; *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520 per Rolfe B; *White v M'Dermott* (1872) IR 7 CL 1; *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436, CA; *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA. An oral disclaimer is sufficient: *Bingham v Lord Clanmorris* (1828) 2 Mol 253 per Hart LC. As to the costs of a disclaiming trustee see PARA 815 post.

8 *Nicloson v Wordsworth* (1818) 2 Swan 365 at 370 per Lord Eldon LC; *Townson v Tickell* (1819) 3 B & Ald 31 at 39; *Stacey v Elph* (1833) 1 My & K 195 at 199 per Leach MR; *Begbie v Crook* (1835) 2 Scott 128. The deed operates as a disclaimer of the trust property as well as of the trust; and a release of the trust property by a disclaiming trustee to his co-trustees is improper, as purporting to accept and deal with the property (*Crewe v Dicken* (1798) 4 Ves 97; *Urch v Walker* (1838) 3 My & Cr 702), but it is not fatal to the disclaimer if the intention to disclaim is otherwise clear (*Nicloson v Wordsworth* supra; *Sharp v Sharp* (1819) 2 B & Ald 405; *Lord Wellesley v Withers* (1855) 4 E & B 750).

9 See *Ladbroke v Bleadon* (1852) 16 Jur 630; *Foster v Dawber* (1860) 1 Drew & Sm 172.



- 10 *M'Kenna v Eager* (1875) IR 9 CL 79; *Re Gordon, Roberts v Gordon* (1877) 6 ChD 531 at 534 per Jessel MR.
- 11 *Re Gordon, Roberts v Gordon* (1877) 6 ChD 531 at 534.

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### **813. Disclaimer after lapse of time.**

The execution of a formal disclaimer after a lapse of time is good if the trustee who executes it has never in the meantime acted or consented to act in the trust<sup>1</sup>. The inference to be drawn from the conduct of a trustee who has not over a long period of years executed a formal disclaimer, or expressly declined to act in the trust, is a matter in respect of which there has been a difference of judicial opinion: one view is that the presumption of acceptance of the trust increases with each year of the period of inaction<sup>2</sup>; the other view is that every year of the period of inaction fortifies the presumption of disclaimer<sup>3</sup>.

1 *Peppercorn v Wayman* (1852) 5 De G & Sm 230 at 235.

2 *Re Uniacke* (1844) 1 Jo & Lat 1 (a decision of Sugden LC (then Lord Chancellor of Ireland) in the case of a settlement); *Re Needham* (1844) 1 Jo & Lat 34 (another decision of Sugden LC, but in connection with a will).

3 *Re Clout and Frewer's Contract* [1924] 2 Ch 230 (where Lord Buckmaster (sitting as an additional judge of the Chancery Division) doubted the decisions in *Re Uniacke* (1844) 1 Jo & Lat 1 and *Re Needham* (1844) 1 Jo & Lat 34 (both cited in note 2 supra) and applied the principles of *Re Gordon, Roberts v Gordon* (1877) 6 ChD 531 and *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436, CA). It is considered that the view held by Lord Buckmaster is correct. Cf *Noble v Meymott* (1851) 14 Beav 471; *Paddon v Richardson* (1855) 7 De GM & G 563.

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### **814. Effect of disclaimer.**

A disclaimer or refusal to act in the trust takes effect ab initio and vests the trust property, as from the date when the trust disposition came into operation, exclusively in the trustees who consent to act<sup>1</sup>. If all the trustees disclaim, the property reverts in the disposer, or, if he is dead, in his legal representative, who becomes by operation of law the trustee of the property for the purposes of the trust<sup>2</sup>.

The disclaimer of the trustee, or of all the trustees nominated by the disposer, does not avoid the trust<sup>3</sup>, but a new trustee will be appointed by a court of equity to execute it<sup>4</sup>.

A person who has disclaimed or refused a trust reposed in him cannot afterwards act in it, even by exercising the power of appointing a new trustee<sup>5</sup>; and he does not become a trustee by subsequently acting in connection with the trust as agent of the accepting trustees<sup>6</sup> or as adviser of the beneficiaries<sup>7</sup>.

1 *Smith v Wheeler* (1671) 1 Vent 128; *Adams v Taunton* (1820) 5 Madd 435; *Small v Marwood* (1829) 9 B & C 300 at 307; *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 524 per Parke B; *Peppercorn v Wayman* (1852) 5 De G & Sm 230; *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436, CA. Consequently, dispositions of the trust property by the other trustees are effectual before the disclaiming trustee has executed the disclaimer or has even become aware of his appointment as a trustee: *Peppercorn v Wayman* supra.

2 *Mallot v Wilson* [1903] 2 Ch 494 at 502-503 per Byrne J. After all, the settlor has done everything in his power to constitute the trust: cf *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA (where the settlor had executed share transfers and delivered the share certificates when it was possible that the directors might refuse to register the transfers).

3 *Robson v Flight* (1865) 4 De GJ & Sm 608 at 613 per Lord Westbury LC.

4 *A-G v Stephens* (1834) 3 My & K 347 at 352. As to appointment by the court see PARA 849 et seq post.

5 *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436 at 437, CA. As to the exercise of the statutory power of appointment by the executor of a last surviving trustee when the executor intends to renounce see the Trustee Act 1925 s 36(5); and PARA 836 note 12 post.

6 *Dove v Everard* (1830) 1 Russ & M 231; *Lowry v Fulton* (1839) 9 Sim 104 at 115, 124.

7 *Stacey v Elph* (1833) 1 My & K 195 at 198.

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### **815. Costs of disclaiming trustee.**

A trustee who disclaims is entitled to his expenses of disclaiming out of the trust fund<sup>1</sup> and to his costs of any proceedings to which he is made a party on the footing of being a trustee<sup>2</sup>, except so far as he incurs or occasions costs beyond those actually incidental to making good his disclaimer<sup>3</sup>.

1 *Re Tryon* (1844) 7 Beav 496.

2 *Sherratt v Bentley* (1830) 1 Russ & M 655; *Norway v Norway* (1834) 2 My & K 278; *Bray v West* (1838) 9 Sim 429; *Benbow v Davies* (1848) 11 Beav 369; *Bulkeley v Earl of Eglinton* (1855) 1 Jur NS 994; *Heap v Jones* (1856) 5 WR 106; *Legg v Mackrell* (1860) 2 De GF & J 551. Cf *Howard v Rhodes* (1837) 1 Keen 581 (where costs were not allowed to a trustee who, after having acted, declined to perform the trust reposed in him and thereby rendered necessary a suit for the appointment of a new trustee).

3 *Martin v Persse* (1828) 1 Mol 146.

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### **C. FAILURE OF ORIGINAL APPOINTMENT; DEVOLUTION**

#### **816. Constructive trustee in default of express trustee.**

Where, owing to no person having been originally effectively appointed a trustee by the testator<sup>1</sup>, or to the trustees having all predeceased the testator<sup>2</sup>, or to the trustees all disclaiming the will or inter vivos trust<sup>3</sup>, the trust property becomes in law vested in a person who is a stranger to the trust, he is in equity a constructive trustee of the property and holds it upon the trust to which it is subject<sup>4</sup>.

<sup>1</sup> *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81; *Dodkin v Brunt*(1868) LR 6 Eq 580; *Re Davis' Trusts*(1871) LR 12 Eq 214.

<sup>2</sup> *A-G v Hickman* (1732) 2 Eq Cas Abr 193 at 194; *A-G v Lady Downing* (1767) Wilm 1 at 19, 22, 24; *Moggridge v Thackwell* (1792) 1 Ves 464 at 475 per Lord Thurlow LC (on rehearing (1803) 7 Ves 36; affd (1807) 13 Ves 416, HL).

<sup>3</sup> *Fletcher v Fletcher* (1844) 4 Hare 67; *Robson v Flight* (1865) 4 De GJ & Sm 608; *Mallott v Wilson*[1903] 2 Ch 494.

<sup>4</sup> *Sonley v Clock-makers' Co* (1780) 1 Bro CC 81; *Re Davis' Trusts*(1871) LR 12 Eq 214. As to the failure of trustees see PARA 807 ante.

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### **817. Trusteeship by devolution.**

Upon the death of a trustee leaving no co-trustee surviving, the terms of the instrument creating the trust may be such as to invest the person on whom the trust property then devolves with the office and powers of a trustee<sup>1</sup>. If he is the personal representative, such a person has an absolute right to decline to accept the position and duties of trustee<sup>2</sup> and is liable at any time to be deprived of the office and powers by the appointment of new trustees<sup>3</sup>; if such an appointment is made, he ceases to be a trustee unless he is thereby appointed a new trustee<sup>4</sup>. Subject to any direction to the contrary in the instrument<sup>5</sup> creating the trust, the legal personal representatives or representative of a sole trustee or, where there were two or more trustees, of the last surviving or continuing trustee, may, until the appointment of new trustees<sup>6</sup>, exercise or perform any power or trust given to or capable of being exercised by the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust<sup>7</sup>.

1 *Re Morton and Hallett* (1880) 15 ChD 143 at 146-147, CA, per Jessel MR, and at 149 per James LJ; *Re Jordan, Hayward v Hamilton* [1904] 1 Ch 260 at 262 et seq per Byrne J; *Re Waidanis, Rivers v Waidanis* [1908] 1 Ch 123, CA. Real estate now devolves by statute on the personal representative of a sole or last surviving trustee: see PARA 731 ante.

2 *Re Benett, Ward v Benett* [1906] 1 Ch 216 at 225, CA. As to disclaimer by a trustee by devolution see PARA 812 ante.

3 *Re Morton and Hallett* (1880) 15 ChD 143 at 149, CA; *Re Jordan, Hayward v Hamilton* [1904] 1 Ch 260 at 262 et seq; *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280.

4 *Re Morton and Hallett* (1880) 15 ChD 143 at 149, CA; *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280. See also the Trustee Act 1925 s 18(2); and the text and notes 5-7 infra.

5 For these purposes, 'instrument' includes Act of Parliament: *ibid* s 68(1) PARA (5).

6 These words confirm the decision in *Re Routledge's Trusts, Routledge v Saul* [1909] 1 Ch 280 (see the text and note 4 supra).

7 See the Trustee Act 1925 ss 18(2), 69(2); and PARA 981 post. For the meaning of 'personal representative' see PARA 602 note 1 ante. Section 18 takes effect subject to the statutory restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation: s 18(3). As to such restrictions see PARAS 799, 804 ante, 822 post. Except where otherwise expressly provided, the Trustee Act 1925 applies to trusts whenever created: see s 69(1); and PARA 603 note 1 ante.

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## **(ii) Appointment of New Trustees**

### **A. IN GENERAL**

#### **818. Mode of appointment.**

A new trustee is appointed:

- 138 (1) under a power for that purpose conferred by the trust disposition<sup>1</sup>;
- 139 (2) under the power for the purpose conferred by the Trustee Act 1925<sup>2</sup>;
- 140 (3) under the power conferred on beneficiaries by the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup>;
- 141 (4) by a donee of a power of attorney<sup>4</sup>;
- 142 (5) by a court of competent jurisdiction<sup>5</sup>; or
- 143 (6) in the case of charitable trusts, by the Charity Commission<sup>6</sup>.

An appointment of new trustees is complete before the trust estate is transferred to them<sup>7</sup>. The costs of and incidental to the appointment of a new trustee are payable out of the capital of the trust property<sup>8</sup>.

1 *Tempest v Lord Camoys* (1882) 21 ChD 571 at 578, CA, per Jessel MR. The power may be exercised even when the trust is being administered by the court: *Tempest v Lord Camoys* supra at 578. A power to appoint trustees of a settlement may be imported by reference to an earlier settlement: *Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358 at 361 per Neville J.

2 See the Trustee Act 1925 s 36 (as amended); and PARA 835 et seq post.

3 See PARA 845 et seq post.

4 See PARA 848 post. As to powers of attorney generally see AGENCY vol 1 (2008) PARA 194 et seq.

5 As to appointment by the court generally see PARA 849 et seq post.

6 As to the appointment of trustees of charitable trusts, and as to the Charity Commission, see CHARITIES.

7 *Noble v Meymott* (1851) 14 Beav 471 at 478 per Romilly MR.

8 *Re Fulham* (1850) 15 Jur 69; *Ex p Davies* (1852) 16 Jur 882; *Lord Brougham v Lord Poulett* (1855) 19 Beav 119; *Re Fellows' Settlement* (1856) 2 Jur NS 62; *Carter v Sebright* (1859) 26 Beav 374 at 376-377 per Romilly MR; *Harvey v Olliver* (1887) 57 LT 239 at 240-241 per Kay J. As to the payment of expenses generally see PARA 748 ante.

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## **B. APPOINTMENT UNDER POWER IN TRUST DISPOSITION**

### **(A) IN GENERAL**

#### **819. Terms and mode of appointment.**

An appointment of a new trustee under a power for that purpose contained in the trust disposition must be in accordance in all material respects with the terms of the power<sup>1</sup>. It should in strictness be made by direct operative words<sup>2</sup>, but it may be effected by a recital or statement in a deed to which the appointor is a party to the effect that he has appointed a certain person as a new trustee or that such person is the present trustee<sup>3</sup>. Where several persons have a power of appointing a new trustee, they may, in the absence of any direction to the contrary, exercise the power by separate instruments<sup>4</sup>.

1 *Lancashire v Lancashire* (1848) 2 Ph 657. In the case of a public trust, the non-compliance with a direction in the instrument of trust that new trustees are to be appointed by the surviving trustees, whenever they are reduced to a certain number, does not vitiate the title of the trustees appointed by a smaller number of surviving trustees: *A-G v Cumming* (1843) 2 Y & C Ch Cas 139.

2 *Miller v Priddon* (1852) 1 De GM & G 335.

3 *Re Farnell's Settled Estates* (1886) 33 ChD 599.

4 *Warburton v Sandys* (1845) 14 Sim 622 at 631 per Shadwell V-C.



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## **820. Communication with beneficiaries.**

Where the power of appointment is vested in the subsisting trustees, they should, before exercising it, communicate with the beneficiaries who are sui juris, and take into account their reasonable wishes on the subject<sup>1</sup>. They are, however, not bound to follow the beneficiaries' wishes even if the beneficiaries are all sane, adult and collectively entitled to the whole beneficial interest; the collective power is a power to determine the trust but not to appoint new trustees under it while it still subsists<sup>2</sup>.

1 *O'Reilly v Alderson* (1849) 8 Hare 101 at 102 et seq per Wigram V-C.

2 *Re Higginbottom* [1892] 3 Ch 132; *Re Brockbank, Ward v Bates* [1948] Ch 206, [1948] 1 All ER 287.

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## **821. Non-interference by the court.**

The court does not interfere with the appointment of new trustees by the persons in whom the power of appointment is vested<sup>1</sup>. After proceedings have been instituted in court for administering the trust, they can still exercise the power, unless by the order made in the administration proceedings the power is withdrawn from them and not merely suspended<sup>2</sup>; but their nominee must be approved by the court<sup>3</sup>.

1 *Re Hodson's Settlement* (1851) 9 Hare 118; *Thomas v Williams* (1883) 24 ChD 558 at 567-568; *Re Higginbottom* [1892] 3 Ch 132; *Re Brockbank, Ward v Bates* [1948] Ch 206, [1948] 1 All ER 287. It is otherwise where the donee of the power is a minor: *Re Parsons, Barndale and Smallman v Parsons* [1940] Ch 973, [1940] 4 All ER 65. The court does not interfere even though the appointment is undesirable: *Re Coode, Coode v Foster* (1913) 108 LT 94. Cf *Re Cotter, Jennings v Nye* [1915] 1 Ch 307.

2 *Middleton v Reay* (1849) 7 Hare 106; *Re Sales, Sales v Sales* [1911] WN 194; *Re Cotter, Jennings v Nye* [1915] 1 Ch 307.

3 *Webb v Earl of Shaftesbury, Earl of Shaftesbury v Arrowsmith* (1802) 7 Ves 480; *Cafe v Bent* (1843) 3 Hare 245; *Graham v Graham* (1853) 16 Beav 550; *Tempest v Lord Camoys* (1882) 21 ChD 571 at 578, CA, per Jessel MR; *Re Gadd, Eastwood v Clark* (1883) 23 ChD 134, CA; *Thomas v Williams* (1883) 24 ChD 558 at 567-568; *Re Norris, Allen v Norris* (1884) 27 ChD 333. Their proper course after judgment has been obtained is to submit to the court the names of the persons whom they propose to appoint: *Re Hall, Hall v Hall* (1885) 54 LJ Ch 527. If these persons are deemed improper by the court, the persons in whom the power of appointment is vested have the right to propose others: *Re Gadd, Eastwood v Clark* supra at 137. A judicial trustee is, however, an officer of the court and has no power of appointing his successor: *Re Johnston, Mills v Johnston* [1911] WN 234.

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## **822. Number to be appointed.**

Where the power authorises the appointment of one or more person or persons or of any person or persons to be a trustee or trustees in the place of a trustee or trustees, the place of a trustee may be filled up by the appointment of more than one new trustee<sup>1</sup>. The original number of trustees need not, however, be maintained on an appointment of new trustees<sup>2</sup> unless the language of the trust disposition expressly or impliedly so directs<sup>3</sup>.

In the case of settlements of land and dispositions creating trusts of land, the number of trustees who may be appointed is limited by statute<sup>4</sup>. The number of trustees must not be increased beyond four<sup>5</sup>. This restriction does not apply in the case of: (1) land vested in trustees for charitable, ecclesiastical or public purposes<sup>6</sup>; or (2) where the net proceeds of the sale of the land are held for like purposes<sup>7</sup>; or (3) to trustees of a term of years absolute limited by a settlement on trusts for raising money<sup>8</sup>, or of the like terms created under the statutory remedies<sup>9</sup> relating to annual sums charged on land<sup>10</sup>.

Notwithstanding anything to the contrary in the vesting instrument, capital money arising under the Settled Land Act 1925<sup>11</sup> is not to be paid to fewer than two persons as trustees of a settlement, unless the trustee is a trust corporation<sup>12</sup>. Similarly, notwithstanding anything to the contrary in the instrument (if any) creating a trust of land or in any trust affecting the net proceeds of sale of the land if it is sold, the proceeds of sale or other capital money are not to be paid to or applied by the direction of fewer than two persons as trustees except where the trustee is a trust corporation<sup>13</sup>. Further a conveyance or deed must be made by at least two trustees or a trust corporation to overreach any powers or interests affecting a legal estate in land<sup>14</sup>. These rules are sometimes referred to as the 'two trustee rules'.

No effective appointment under the Trustee Act 1925<sup>15</sup> of a sole trustee, not being a trust corporation, can be made where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust<sup>16</sup>.

1 *Meinertzhagen v Davis* (1844) 1 Coll 335; *Hillman v Westwood* (1854) 24 LJ Ch 57; but see *Re Clark, ex p Davis* (1843) 2 Y & C Ch Cas 468. See also PARA 840 post.

2 *Emmet v Clark* (1861) 3 Giff 32 at 35 per Stuart V-C. See also PARA 840 post.

3 *Earl Lonsdale v Beckett* (1850) 4 De G & Sm 73; *Re Cunningham and Bradley's Contract for Sale to Wilson* [1877] WN 258; cf *Cohen v Bayley-Worthington* [1908] AC 97, HL.

4 As to the limitation of the number of trustees in these cases generally see PARA 804 ante. For the meaning of 'trust of land' see PARA 605 note 5 ante.

5 Trustee Act 1925 s 34(2)(b) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(9)). As to the effect of more than four persons being named as trustees see PARA 804 ante.

6 Trustee Act 1925 s 34(3)(a).

7 *Ibid* s 34(3)(b).

8 See SETTLEMENTS vol 42 (Reissue) PARA 727 et seq.

9 See the Law of Property Act 1925 s 121(4); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 874-875.

10 Trustee Act 1925 s 34(3)(c).

11 As to such capital money see SETTLEMENTS vol 42 (Reissue) PARA 795.

12 See the Settled Land Act 1925 ss 18(1)(c), 94(1); and SETTLEMENTS vol 42 (Reissue) PARA 786. As to trust corporations see PARA 798 et seq ante.

13 See the Law of Property Act 1925 s 27(2) (as substituted and amended); and SALE OF LAND vol 42 (Reissue) PARA 312.

14 See ibid s 2(1), (2) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 249.

15 As to such appointments generally see PARA 835 et seq post.

16 Trustee Act 1925 s 37(2). As to keeping up the number of trustees in these cases on the discharge of a trustee see PARA 840 post.

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## (B) CASES IN WHICH APPOINTMENT MAY BE MADE

### **823. Appointment in place of trustee who dies or disclaims.**

A power of appointment of new trustees authorises the appointment of a trustee in the place of a named original trustee who dies before the trust takes effect<sup>1</sup>, or who disclaims the trust without having ever acted in it<sup>2</sup>, unless a contrary intention is indicated by the language of the instrument which contains the power<sup>3</sup>.

A power to appoint a trustee in the place of one who desires to be discharged from or declines or refuses to act in the trust authorises an appointment in the place of one who has never acted in and who disclaims the trust<sup>4</sup>, or of one who under the Trustee Act 1925<sup>5</sup> pays the trust fund into court<sup>6</sup>.

1 Eg where a trustee named in a will predeceases the testator: *Re Hadley, ex p Hadley* (1851) 5 De G & Sm 67; *Nicholson v Wright* (1857) 26 LJ Ch 312.

2 *Noble v Meymott* (1851) 14 Beav 471 at 477 per Romilly MR.

3 *Winter v Rudge* (1847) 15 Sim 596.

4 *Noble v Meymott* (1851) 14 Beav 471 at 477 per Romilly MR.

5 As to payment into court by trustees see the Trustee Act 1925 s 63 (as amended); and PARA 917 et seq post.

6 *Re Williams' Settlement* (1858) 4 K & J 87.

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## **824. Bankruptcy and incapacity.**

An appointment of a new trustee in the place of one who becomes bankrupt is authorised by a power to appoint a new trustee in the place of a trustee who becomes unfit to act<sup>1</sup>, but not by a power to appoint in the place of one who is incapable of acting<sup>2</sup>. A power in the last-mentioned form refers exclusively to personal incapacity<sup>3</sup>, and therefore authorises an appointment in the place of a trustee lacking mental capacity<sup>4</sup>. Absence abroad does not constitute unfitness or incapacity on the part of a trustee<sup>5</sup>; and a direction that a trustee ceases to fill the post on departing from the United Kingdom from any cause and in any circumstances does not apply to a mere temporary absence<sup>6</sup>. If, however, the power extends to appointing a new trustee in the place of one going to reside abroad or being abroad, and that event happens, the power should be exercised, and a beneficiary may call upon the donee of the power to exercise it<sup>7</sup>.

1 *Re Roche* (1842) 1 Con & Law 306; *Re Wheeler and De Rochow* [1896] 1 Ch 315.

2 *Turner v Maule* (1850) 15 Jur 761; *Re Watts's Settlement* (1851) 9 Hare 106.

3 *Turner v Maule* (1850) 15 Jur 761; *Re Watts's Settlement* (1851) 9 Hare 106; *Re Bignold's Settlement Trusts* (1872) 7 Ch App 223.

4 *Re East, Re Bellwood's Will Trusts* (1873) 8 Ch App 735. As to the appointment under the Trustee Act 1925 of a new trustee in place of a mentally disordered trustee, or a trustee who lacks capacity to exercise his functions as trustee see PARA 838 post. As to the appointment under the Trusts of Land and Appointment of Trustees Act 1996 of a substitute for an incapable trustee see PARA 846 post.

5 *Withington v Withington* (1848) 16 Sim 104; *O'Reilly v Alderson* (1849) 8 Hare 101; *Re Harrison's Trusts* (1852) 22 LJ Ch 69; *Re Bignold's Settlement Trusts* (1872) 7 Ch App 223. The contrary has been held where a trustee had for many years a foreign domicile: see *Mennard v Welford* (1853) 1 Sm & G 426.

6 *Re Moravian Society* (1858) 26 Beav 101; *Re Walker, Summers v Barrow* [1901] 1 Ch 259.

7 *O'Reilly v Alderson* (1849) 8 Hare 101; *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288.

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## (C) WHO MAY APPOINT NEW TRUSTEES

### **825. Persons designated.**

The power of appointment is vested in the person or persons, if any, named or designated in the instrument creating the trust<sup>1</sup>.

Where an executory trust disposition contemplates a future appointment of trustees without prescribing by whom it is to be made, it cannot be made by the tenant for life for the time being of the trust property<sup>2</sup>.

1 A minor may appoint a new trustee but will not be bound by an act which is either imprudent or prejudicial to his interest or which, where he is executing an authority entrusted to him, touches his interest: *Re Parsons, Barnsdale and Smallman v Parsons*[1940] Ch 973, [1940] 4 All ER 65.

2 *Brasier v Hudson* (1837) 9 Sim 1 at 11, 16.

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## **826. Beneficiaries.**

Where a power of appointing new trustees is conferred on a person by name who is beneficially interested in the trust property, he may exercise the power even though he has incumbered or alienated his beneficial interest<sup>1</sup>.

A power to named beneficiaries to appoint new trustees with the consent or concurrence of the surviving or continuing trustees or trustee for the time being is exercisable by them at their sole discretion when there is no trustee living or continuing to act<sup>2</sup>.

1 *Hardaker v Moorhouse* (1884) 26 ChD 417; and see *Raikes v Raikes* (1863) 32 Beav 403.

2 *Morris v Preston* (1802) 7 Ves 547 at 551 et seq; *Re Roche* (1842) 1 Con & Law 306.



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## **827. Surviving and continuing trustee.**

Where the power to appoint new trustees is vested in the trustees who are for the time being surviving, even though it is given to the original trustees by name, it is annexed to their office<sup>1</sup>. Therefore, it may be exercised by a single continuing trustee during the life of another of the original trustees who has disclaimed the trust<sup>2</sup>.

Where an express power of appointment is vested in the surviving or continuing trustees, it cannot be exercised by a trustee who declines to act<sup>3</sup>, or who is retiring from the trust<sup>4</sup>, but is exercisable independently of him by the other trustees who are actually continuing in the trust<sup>5</sup>. Where, however, the power is vested in the surviving or continuing or other trustee or trustees, it is exercisable by a retiring trustee<sup>6</sup>.

1 *Cafe v Bent* (1845) 5 Hare 24 at 37 per Wigram V-C; cf *Re Smith, Eastick v Smith* [1904] 1 Ch 139 at 144; *Re Bacon, Toovey v Turner* [1907] 1 Ch 475.

2 *Cafe v Bent* (1845) 5 Hare 24 at 37.

3 *Nicholson v Wright* (1857) 26 LJ Ch 312; *Travis v Illingworth* (1865) 2 Drew & Sm 344.

4 *Stones v Rowton* (1853) 17 Beav 308. A declining or retiring trustee may be, and often is, expressly or impliedly empowered to appoint or join in the appointment in like manner as if he were a continuing trustee: *Re Hadley, ex p Hadley* (1851) 5 De G & Sm 67; *Emmet v Clark* (1861) 3 Giff 32; *Re Glenny and Hartley* (1884) 25 ChD 611. As to the statutory power see PARA 836 post.

5 *Re Norris, Allen v Norris* (1884) 27 ChD 333; *Re Coates to Parsons* (1886) 34 ChD 370.

6 *Lord Camoys v Best* (1854) 19 Beav 414.

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### **828. Acting trustee or representatives of last trustee.**

Where an express power of appointing new trustees is vested in the acting trustees or trustee for the time being or the executors or administrators of the last acting trustee, the representatives of the last surviving trustee, having the trust property vested in them and being capable in law of executing the trust, are acting trustees who may exercise the power<sup>1</sup>. Similarly, where the power is vested in a named person, his executors or administrators or assigns, it is validly exercised after his death by his acting executors without the concurrence of another who has renounced probate of his will<sup>2</sup>.

Unless the instrument creating the trust contains a direction to the contrary, a power of appointment of new trustees capable of being exercised by a sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust, may be exercised by the personal representatives of such a trustee<sup>3</sup>.

1 *Re Cunningham and Frayling* [1891] 2 Ch 567. Where the power was vested in the acting executors or administrators of the last surviving trustee, of whom, after his death, there was no legal personal representative, administration of his estate was granted to the guardian of beneficiaries who were minors, limited to the appointment of the guardian and another person as new trustees and to the obtaining of a transfer of the trust funds to them: *Re Jackson* (1881) 7 LR 318.

2 *Earl Granville v M'Neile* (1849) 7 Hare 156. Where a power of appointing new trustees is given to a corporation which is dissolved, a surviving trustee may exercise the statutory power of appointment: *Re Spencer, Duncan v Royal Geological Society* (1916) 33 TLR 16.

3 See the Trustee Act 1925 ss 18(2), 69(2); and PARA 817 ante. For the meaning of 'personal representative' see PARA 602 note 1 ante.

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### **829. Trustee abroad.**

On the death of one trustee, a power of a subsisting trustee to appoint a new trustee in the place of a trustee dying, or going to reside abroad, may be exercised by the surviving trustee, notwithstanding that he is himself residing abroad<sup>1</sup>.

<sup>1</sup> *O'Reilly v Alderson* (1849) 8 Hare 101.

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### **830. Powers where person is mentally disordered or lacking capacity.**

Until 1 October 2007<sup>1</sup>, where the person in whom a power of appointing new trustees is vested or who has power to consent to such appointment is incapable by reason of mental disorder of managing and administering his property and affairs, the judge<sup>3</sup> may make such orders or give such directions or authorities for the exercise of the power as he thinks fit<sup>4</sup>. The judge may also make such consequential vesting or other orders as respects the trust property as the case may require<sup>5</sup>.

As from 1 October 2007<sup>6</sup>, where the person in whom a power of appointing new trustees is vested or who has power to consent to such appointment lacks capacity in relation to the matter<sup>7</sup>, the Court of Protection<sup>8</sup> may by making an order make decisions on behalf of the person concerned in relation to the matter<sup>9</sup>. The court may also make such further orders or give such directions as it thinks necessary or expedient for giving effect to such order<sup>10</sup>.

1 The Mental Health Act 1983 Pt VII (ss 93-113) (as amended) is repealed by the Mental Capacity Act 2005 ss 66(1)(a), (2), 67(2), Sch 7 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

2 I.e. a person who is a patient for the purposes of the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively repealed (see note 1 supra)): see MENTAL HEALTH vol 30(2) (Reissue) PARA 681.

3 For the meaning of 'judge' for these purposes see MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

4 See the Mental Health Act 1983 s 96(1)(k) (prospectively repealed: see note 1 supra); and MENTAL HEALTH vol 30(2) (Reissue) PARA 701 et seq. In making any such order or giving any such direction or authority, the judge must have regard first of all to the requirements of the patient: see s 95(2) (prospectively repealed: see note 1 supra); and MENTAL HEALTH vol 30(2) (Reissue) PARA 682. The judge may appoint a receiver to exercise any power vested in the patient with regard to the appointment of new trustees: see s 99(1), (2) (prospectively repealed: see note 1 supra); and MENTAL HEALTH vol 30(2) (Reissue) PARA 704 et seq.

5 See *ibid* s 96(2) (prospectively repealed: see note 1 supra); and MENTAL HEALTH vol 30(2) (Reissue) PARA 692. The orders which may be made include any order which could have been made under the Trustee Act 1925 Pt IV (ss 41-63A) (as amended) in such a case: see the Mental Health Act 1983 s 96(2) (prospectively repealed: see note 1 supra); and MENTAL HEALTH vol 30(2) (Reissue) PARA 692. As to the extent of the concurrent jurisdiction with the High Court of the authority having jurisdiction under Pt VII (as amended) in relation to patients who are trustees see the Trustee Act 1925 s 54 (as substituted and amended); and PARA 851 post. See also MENTAL HEALTH vol 30 (Reissue) PARA 718 et seq.

6 The Mental Capacity Act 2005 Pt 2 (ss 45-61) comes into force on 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

7 A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: see the Mental Capacity Act 2005 s 2(1); and MENTAL HEALTH vol 30(2) (Reissue) PARA 641. As to persons who lack capacity generally see Pt 1 (ss 1-44); and MENTAL HEALTH vol 30(2) (Reissue) PARA 641 et seq.

8 As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 750.

9 See the Mental Capacity Act 2005 ss 16(1)(b), (2)(a), 18(1)(j); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 757, 759. The powers of the Court of Protection under s 16 are subject to the provisions of the Mental Capacity Act 2005 and, in particular, to s 1 (the principles) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 641) and s 4 (best interests) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 642); see s 16(4); and MENTAL HEALTH vol 30(2) (Reissue)

PARA 757. Although the Court of Protection has power to appoint a deputy under s 16(2)(b) to make decisions on behalf of a person lacking capacity, a deputy may not be given powers with respect to the exercise of any power (including a power to consent) vested in the person concerned whether beneficially or as a trustee or otherwise: see s 20(3)(c); and MENTAL HEALTH vol 30(2) (Reissue) PARA 760. As to transitional provisions and savings where a receiver was appointed under the Mental Health Act 1983 s 99 (prospectively repealed: see note 1 supra) see the Mental Capacity Act 2005 s 66(4), Sch 5 para 1; and MENTAL HEALTH vol 30(2) (Reissue) PARA 406.

10 See *ibid* ss 16(5), 18(1)(j); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 757, 759. The orders which may be made include any order which could have been made under the Trustee Act 1925 Pt IV (ss 41-63A) (as amended) (see PARA 973 post et seq) in such a case: see the Mental Capacity Act 2005 s 18(4), Sch 2 para 5(2); and MENTAL HEALTH vol 30(2) (Reissue) PARA 759.

As to the extent of the concurrent jurisdiction of the High Court with the Court of Protection in relation to a person who lacks capacity to exercise his functions as trustee see the Trustee Act 1925 s 54 (as substituted); para 851 post; and MENTAL HEALTH vol 30(2) (Reissue) PARA 721.

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## (D) WHO MAY BE APPOINTED AS NEW TRUSTEE

### **831. Donee of power.**

The person in whom the power of appointing new trustees is vested cannot appoint himself as a new trustee if the appointment directs the appointment of some 'other' person or persons or if the power is vested in him by virtue of his fiduciary position in relation to the trust<sup>1</sup>. The legal personal representative of a trustee, when invested with a power of appointing new trustees in which the word 'other' does not occur, may, however, exercise it by appointing himself<sup>2</sup>.

<sup>1</sup> *Re Skeats' Settlement, Skeats v Evans*(1889) 42 ChD 522; *Re Newen, Newen v Barnes*[1894] 2 Ch 297. See also PARA 836 note 15 post.

<sup>2</sup> *Re Jackson* (1881) 7 LR Ir 318; *Montefiore v Guedalla*[1903] 2 Ch 723. See also *Tempest v Lord Camoys* (1888) 58 LT 221 at 224 per Chitty J. Where the power of appointment is vested in the acting trustee with the consent of the tenant for life, he may appoint the tenant for life: *Forster v Abraham*(1874) LR 17 Eq 351.

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### **832. Person with conflict of interest.**

A person whose circumstances might give rise to a conflict of interest may be appointed validly as a trustee notwithstanding that the court would not have made or sanctioned the appointment if asked to do so<sup>1</sup>.

<sup>1</sup> *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288 (a beneficiary for life invested with the power of appointment may appoint his own solicitor as a new trustee if the appointment is in other respects unobjectionable); cf *Re Cotter, Jennings v Nye* [1915] 1 Ch 307. The appointment as trustees of two solicitors in partnership together would not necessarily be invalid, although obviously inexpedient: *Re Norris, Allen v Norris* (1884) 27 ChD 333 at 341 per Pearson J. A bank is not prevented from being appointed a new trustee merely because one or more or all of the beneficiaries happen to be its customers: *Re Northcliffe's Settlements* [1937] 3 All ER 804, CA. The fact that a trustee is a director of a company some of whose shares are held by the trustees, that he is a personal shareholder in the same company and a member of the class of discretionary beneficiaries does not of itself make his appointment invalid or give grounds for his removal: *Isaac v Isaac* [2005] EWHC 435 (Ch), [2005] All ER (D) 379 (Mar). 'If an actual conflict arises the law will expect the trustee to handle it carefully and appropriately in the circumstances, but no-one suggests that such persons cannot be validly appointed in the first place': *Isaac v Isaac* supra at [76] per Parkes J. As to appointment by the court exercising an original discretion see PARAS 861-862 post.

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### **833. Aliens and corporations.**

Unless expressly forbidden by the terms of the power, the appointment of an alien or person out of the jurisdiction is valid<sup>1</sup>. Where new trustees outside the jurisdiction are appointed to replace existing trustees, the trust ceases to be within the jurisdiction of the court. This is referred to as exporting, or emigrating, a trust. If for their own protection trustees or other appointors seek the authorisation of the court, the court is concerned to ensure that the proposed exercise of the trustees' power of appointment is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees would act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of the beneficiaries or the trust estate<sup>2</sup>.

Where the terms of the power admit of it, a corporation may be appointed a new trustee<sup>3</sup>.

1 *Meinertzhagen v Davis* (1844) 1 Coll 335. See also *Re Smith's Trusts* [1872] WN 134; *Re Cunard's Trusts* (1878) 48 LJ Ch 192. Cf *Re Whitehead's Will Trusts*, *Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833.

2 *Richards v Mackay* (1987) 11 Tru LI 23 (where it was said that the language of Pennycuik J in *Re Whitehead's Will Trusts*, *Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833 was too restrictive in the circumstances of the present day); *Re Beatty's Will Trusts (No 2)* (1987) 11 Tru LI 77. As to appointment by the court exercising an original discretion see PARA 863 post.

3 *Re Thompson's Settlement Trusts*, *Thompson v Alexander* [1905] 1 Ch 229 (where the power was 'to appoint a new trustee or new trustees' and not simply an individual or individuals to be a new trustee or new trustees).



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### **834. Appointment of trustees of land.**

Appointments of new trustees of land<sup>1</sup> and of new trustees of any trust of the proceeds of sale of the land must be made in such manner as to secure that the same persons become trustees of land and trustees of the trust of the proceeds of sale<sup>2</sup>.

<sup>1</sup> For the meaning of 'land' see PARA 605 note 5 ante. For the meaning of 'trust of land' as defined by the Trusts of Land and Appointment of Trustees Act 1996 see PARA 605 note 5 ante.

<sup>2</sup> Trustee Act 1925 s 35(1), (4) (s 35(1) substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(10)(a)). Appointments must, subject to any order of the court, be effected by separate instruments: see the Trustee Act 1925 s 35(1) (as so substituted). Where new trustees of land are appointed, a memorandum of the persons who are for the time being the trustees of the land must be indorsed on or annexed to the conveyance by which the land was vested in trustees of land; and that conveyance must be produced to persons who are for the time being the trustees of the land by the person in possession of it in order for that to be done when the trustees require its production: s 35(3) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 3(10)(b)).

See also the Law of Property Act 1925 s 24(1) (as substituted); and SETTLEMENTS vol 42 (Reissue) PARA 900. A purchaser is not concerned to see that s 24(1) (as substituted) has been complied with: see s 24(2) (as substituted); and SETTLEMENTS vol 42 (Reissue) PARA 900. It applies whenever the trust of land and the trust of proceeds of sale were created or arose: see s 24(3) (as substituted); and SETTLEMENTS vol 42 (Reissue) PARA 900.

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### **C. APPOINTMENT OF NEW TRUSTEES UNDER THE TRUSTEE ACT 1925**

#### **835. Statutory power of appointment.**

A new trustee may be appointed under general powers given by statute<sup>1</sup>. These powers apply to trustees for the purposes of the Settled Land Act 1925<sup>2</sup> and to trustees for the purpose of the management of land during a minority<sup>3</sup>, whether such trustees are appointed by the court or by the settlement<sup>4</sup> or under provisions contained in any instrument<sup>5</sup>, and are in addition to the powers conferred by the instrument, if any, creating the trust; but those powers apply only if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms and provisions of that instrument<sup>6</sup>.

1 See the Trustee Act 1925 s 36 (as amended) (replacing with slight variations of language the Trustee Act 1893 s 10 (repealed)); and PARA 836 post. The enactment applies to religious or educational trusts (see *Re Coates to Parsons*(1886) 34 ChD 370; and CHARITIES vol 8 (2010) PARA 282), but does not affect the practice of the High Court as to the appointment of new trustees (*Re Aston*(1883) 23 ChD 217, CA, per Jessel MR). As to the appointment of trustees of friendly societies see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2179 et seq.

2 As to the appointment of such trustees see SETTLEMENTS vol 42 (Reissue) PARA 756. Two or more personal representatives who are trustees of settled land by virtue of the Settled Land Act 1925 s 30(3) (see SETTLEMENTS vol 42 (Reissue) PARAS 751, 756) can retire and appoint new trustees in their places: *Re Dark, Glover v Dark*[1954] Ch 291, [1954] 1 All ER 681. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

3 See the Settled Land Act 1925 s 102 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 665 et seq. See also note 2 supra.

4 For the meaning of 'settlement' see PARA 804 note 1 ante.

5 Trustee Act 1925 s 64(1). For the meaning of 'instrument' see PARA 817 note 5 ante.

6 Ibid s 69(2).

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### 836. Circumstances in which appointment may be made.

Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead<sup>1</sup>, or remains out of the United Kingdom for more than 12 months<sup>2</sup>, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him<sup>3</sup>, or refuses<sup>4</sup>, or is unfit<sup>5</sup>, to act in such trusts, or is incapable of acting in such trusts<sup>6</sup>, or is a minor:

- 144 (1) the person or persons nominated for the purpose of appointing new trustees by the instrument<sup>7</sup>, if any, creating the trust<sup>8</sup>; or
- 145 (2) if there is no such person<sup>9</sup>, or no such person able and willing to act<sup>10</sup>, then the surviving or continuing trustees or trustee for the time being<sup>11</sup>, or the personal representative<sup>12</sup> of the last surviving or continuing trustee<sup>13</sup>,

may by writing<sup>14</sup> appoint one or more other persons (whether or not being the persons exercising the power<sup>15</sup>) to be a trustee or trustees in the place of that trustee<sup>16</sup>. An appointment has to be 'in the place of' a retiring trustee, and this cannot be construed so that the appointment of one new trustee would be effective to discharge two retiring trustees<sup>17</sup>.

1 The provisions of the Trustee Act 1925 s 36 (as amended) relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator: s 36(8). Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead; and the provisions of s 36 (as amended) apply accordingly but subject to the restrictions imposed (see PARAS 804, 822 ante) on the number of trustees: s 36(2).

2 This does not make persons resident abroad ineligible to be appointed trustees in appropriate circumstances: see *Re Whitehead's Will Trusts*, *Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833; *Richards v MacKay* (1987) 11 Tru LI 23; *Re Beatty's Will Trusts (No 2)* (1987) 11 Tru LI 77.

A trustee who has remained out of the United Kingdom for more than 12 months can be removed against his will: *Re Stoneham's Settlement Trusts*, *Popkiss v Stoneham* [1953] Ch 59, [1952] 2 All ER 694.

For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

3 Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, in the case of a corporation, as if the corporation desired to be discharged from the trust; and the provisions of the Trustee Act 1925 s 36 apply accordingly but subject to the restrictions imposed (see PARAS 804, 822 ante) on the number of trustees: s 36(2).

4 As to acceptance and disclaimer of office see PARA 808 et seq ante; and as to vacation of office see PARA 889 et seq post.

5 As to incapacity see PARA 824 ante.

6 Where a corporation, being a trustee, is or has been dissolved, then, for the purposes of the Trustee Act 1925 s 36 (as amended) and of any enactment replaced thereby, the corporation is deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation: s 36(3). A person who lacks mental capacity is incapable of acting: see PARA 824 ante. A trustee residing in enemy occupied territory during wartime is not necessarily incapable of acting: *Re May's Will Trusts*, *May and Stanford v Burch* [1941] Ch 109 (where *Re Sichel's Settlements*, *Sichel v Sichel* [1916] 1 Ch 358 appears not to have been cited).

7 For the meaning of 'instrument' see PARA 817 note 5 ante.

8 Trustee Act 1925 s 36(1)(a). This provision must be taken to mean the persons nominated by the instrument in terms which are applicable to the exercise of the statutory power: see *Cecil v Langdon* (1884) 28 ChD 1, CA (decided under earlier similar legislation). It includes persons who are given a general power to appoint new trustees or a new trustee for the settlement: *Re Walker and Hughes' Contract* (1883) 24 ChD 698. Persons empowered by the instrument to appoint a new trustee in, among other events, the event of a trustee becoming incapable, but not in the event of his becoming unfit to act, are not persons nominated to appoint a new trustee in the place of one who becomes unfit to act: *Re Wheeler and De Rochow* [1896] 1 Ch 315, followed with reluctance in *Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358. As to the exercise of a power of appointment where a trustee is mentally disordered or lacking capacity see PARA 830 ante.

9 There is no such person if he cannot be found: *Cradock v Witham* [1895] WN 75.

10 This applies where the persons entitled to appoint cannot agree in appointing: *Re Sheppard's Settlement Trusts* [1888] WN 234.

11 A trustee can insist on exercising the power of appointment against the wishes of the majority of the beneficiaries: *Re Higginbottom* [1892] 3 Ch 132. Moreover, although the beneficiaries are together absolutely entitled to the trust property, they are not entitled, so long as the trust subsists, to control the exercise by the trustees of their power of appointing new trustees: *Re Brockbank, Ward v Bates* [1948] Ch 206, [1948] 1 All ER 287. The provisions of the Trustee Act 1925 s 36 (as amended) relating to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the provisions of s 36 (as amended): s 36(8). His concurrence in the appointment of new trustees is not requisite in the absence of evidence that he is able and willing to concur: *Re Coates to Parsons* (1886) 34 ChD 370. Where a trustee has been removed against his will for being out of the United Kingdom for more than 12 months, he is not 'a refusing or retiring trustee' within the meaning of the Trustee Act 1925 s 36(8), and his concurrence is not required in the appointment of a new trustee: *Re Stoneham's Settlement Trusts, Popkiss v Stoneham* [1953] Ch 59, [1952] 2 All ER 694. As to the power of personal representatives who have cleared the estate to appoint new trustees of the will of the deceased see *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522; *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833. See also PARA 857 note 2 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 564, 568 et seq.

12 For the meaning of 'personal representative' see PARA 602 note 1 ante. The power of appointment is exercisable by the executors for the time being (whether original or by representation) of the surviving or continuing trustee who have proved the will of their testator, or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or not proved (see the Trustee Act 1925 s 36(4)); but a sole or last surviving executor intending to renounce, or all the executors where they all intended to renounce, have power, at any time before renouncing probate, to exercise the power of appointment, if willing to act for that purpose (see s 36(5)). See PARA 828 ante. An executor intending to renounce can appoint new trustees without thereby accepting the office of executor: see s 36(5). The title of the new trustees to act can, however, be proved only when there has been a grant of probate or of letters of administration with the will annexed: *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583. Personal representatives are not bound to exercise the power conferred upon them: *Re Knight's Will* (1883) 26 ChD 82 at 89 per Pearson J; on appeal (1884) 26 ChD 82 at 90, CA.

13 Trustee Act 1925 s 36(1)(b). A person who has never acted in the trust is not reckoned as a trustee and therefore, where all the trustees named in a will predecease the testator, the executors of the last survivor of them cannot appoint new trustees: *Nicholson v Field* [1893] 2 Ch 511. The executors of a sole trustee who dies after having acted can, however, exercise the power of appointment: *Re Shafto's Trusts* (1885) 29 ChD 247.

14 The writing must be inter vivos; a sole surviving trustee cannot appoint new trustees by will and, if by his will he appoints general executors and special executors of the trust, the power of appointing new trustees is vested in the general executors: *Re Parker's Trusts* [1894] 1 Ch 707.

15 These words enable the appointor to appoint himself a trustee and so render obsolete the decisions in *Re Newen, Newen v Barnes* [1894] 2 Ch 297 and *Re Sampson, Sampson v Sampson* [1906] 1 Ch 435.

16 Trustee Act 1925 s 36(1). For evidence as to a vacancy in a trust see PARA 844 post. The power of appointing new trustees is subject to the statutory restrictions on the number of trustees: see s 36(1). As to the statutory restriction on the number of trustees see PARAS 804, 822 ante.

17 *Adam & Co International Trustees Ltd v Theodore Goddard (a firm)* [2000] WTLR 349, 2 ITELR 634.

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### **837. Appointment of trustee where no vacancy.**

Where, in the case of any trust, there are not more than three trustees:

- 146 (1) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust<sup>1</sup>; or
- 147 (2) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being<sup>2</sup>,

may by writing appoint another person or other persons to be an additional trustee or additional trustees<sup>3</sup>; but it is not obligatory to appoint any additional trustee unless the instrument, if any, creating the trust or any statutory enactment provides to the contrary, nor may the number of trustees be increased beyond four by virtue of any such appointment<sup>4</sup>. The appointor may not, however, appoint himself to be an additional trustee<sup>5</sup>.

<sup>1</sup> Trustee Act 1925 s 36(6)(a) (s 36(6) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(11)).

<sup>2</sup> Trustee Act 1925 s 36(6)(b) (as amended: see note 1 supra). See also PARA 848 post.

<sup>3</sup> Ibid s 36(6) (as amended: see note 1 supra).

<sup>4</sup> Ibid s 36(6) (as amended: see note 1 supra).

<sup>5</sup> *Re Power's Settlement Trusts, Power v Power* [1951] Ch 1074, [1951] 2 All ER 513, CA. The appointor may, however, under the Trustee Act 1925 s 36(1) (see PARA 836 ante) appoint himself a substitutional trustee: *Re Power's Settlement Trusts, Power v Power* supra.

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### **838. Trustee mentally disordered or lacking capacity.**

Until 1 October 2007<sup>1</sup>, where a trustee is incapable by reason of mental disorder<sup>2</sup> of exercising his functions as trustee and is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place may be made by the surviving or continuing trustee or the personal representatives of the last surviving or continuing trustee<sup>3</sup> unless leave to make the appointment has been given by the authority having jurisdiction under Part VII of the Mental Health Act 1983<sup>4</sup>. If land subject to a trust of land is vested, solely or jointly, in a trustee who is incapable by reason of mental disorder of exercising his functions as a trustee, he must generally be discharged before the legal estate is dealt with<sup>5</sup>, although a discharge is not required if there is an attorney under an enduring power of attorney, whenever created<sup>6</sup>, entitled to act for the incapable trustee<sup>7</sup>.

As from 1 October 2007<sup>8</sup>, where a trustee lacks capacity<sup>9</sup> to exercise his functions as trustee and is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place may be made by the surviving or continuing trustees or trustee or the personal representatives of the last surviving or continuing trustee<sup>10</sup> unless leave to make the appointment has been given by the Court of Protection<sup>11</sup>. If land subject to a trust of land is vested, solely or jointly, in a trustee who lacks capacity<sup>12</sup> to exercise his functions as a trustee, he must generally be discharged before the legal estate is dealt with<sup>13</sup>, although a discharge is not required if there is an attorney under an enduring power of attorney or lasting power of attorney, whenever created<sup>14</sup>, entitled to act for the trustee who lacks capacity in relation to the dealing<sup>15</sup>.

1 The Trustee Act 1925 is amended by the Mental Capacity Act 2005 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2007/1897.

2 Ie within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) PARA 402.

3 Ie under the Trustee Act 1925 s 36(1)(b): see PARA 836 head (2) ante.

4 Ibid s 36(9) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(a)). As to the authority having jurisdiction under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended) see MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

5 See the Law of Property Act 1925 s 22(2) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(6)). See also MENTAL HEALTH vol 30(2) (Reissue) PARA 626.

6 See the Trustee Delegation Act 1999 s 9(2).

7 See the Law of Property Act 1925 s 22(3) (added by the Trustee Delegation Act 1999 s 9(1)). See also MENTAL HEALTH vol 30(2) (Reissue) PARA 626. As to powers of attorney see AGENCY vol 1 (2008) PARA 194 et seq.

8 See note 1 supra.

9 Ie within the meaning of the Mental Capacity Act 2005: see s 2(1); para 830 note 7 ante; and MENTAL HEALTH vol 30(2) (Reissue) PARA 641 et seq.

10 See note 3 supra.

11 Trustee Act 1925 s 36(9) (as substituted and amended (see note 4 supra); and further amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (2)(b)). See note 1 supra. As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 750.

12 See note 9 supra.

13 See the Law of Property Act 1925 s 22(2) (as substituted and amended (see note 5 supra); and further amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 4(1), (2)(b)). See note 1 supra. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 626.

14 See the Trustee Delegation Act 1999 s 9(2).

15 See the Law of Property Act 1925 s 22(3) (as added (see note 7 supra); and amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 4(1), (2)(c)). See note 1 supra. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 626.

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**839. Power for personal representatives to appoint trustees of minor's legacy.**

Where a minor is absolutely entitled under a will or on an intestacy to property forming part of the estate of a deceased person and that property is not given through the medium of trustees, the personal representatives of the deceased person (irrespective of the date of his death) have power to appoint trustees for the minor in respect of the property and thereby to discharge themselves from all further liability in respect of it<sup>1</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 s 42; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 496. Where this power is exercised, the personal representatives by statutory authority create a trust where no trust previously existed and appoint the original trustees of the trust.



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#### **840. Number of trustees.**

On the appointment of a new trustee for the whole or any part of trust property, the number of trustees may be increased (subject to the statutory restrictions on the number of trustees)<sup>1</sup>. It is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee is not discharged from his trust unless there will be either a trust corporation<sup>2</sup> or at least two persons to act as trustees to perform the trust<sup>3</sup>.

1 Trustee Act 1925 s 37(1)(a). As to the statutory restrictions on the number of trustees see PARAS 804, 822 ante.

2 As to trust corporations see PARA 798 et seq ante.

3 Trustee Act 1925 s 37(1)(c) (amended with savings for transactions taking effect on or after 1 January 1997 by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(12)). See also *Adam & Co International Trustees Ltd v Theodore Goddard (a firm)* [2000] WTLR 349, 2 ITELR 634 (purported retirement not leaving two persons ineffective). Previously the statute referred to 'individuals' not 'persons': see the Trustee Act 1925 s 37(1) (as originally enacted). 'Individuals' means not only natural persons whereas 'persons' extends to corporations: *Jasmine Trustees Ltd v Wells and Hind* [2007] EWHC 38 (Ch), [2007] 1 All ER 1142 (purported retirement not leaving two individuals meant that the trust remained UK resident for capital tax purposes; trustees de son tort not trustees for this purpose). See also PARA 822 text and note 16 ante.

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### **841. Separate sets of trustees.**

On the appointment of a new trustee for the whole or any part of trust property, a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property; and any existing trustee may be appointed or remain one of such separate set of trustees or, if only one trustee was originally appointed, then one separate trustee may be so appointed<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 37(1)(b). The appointment of a sole trustee, not being a trust corporation, will not be effective if the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust: see s 37(2); and PARA 822 ante. As to what are separate trusts see *Roome v Edwards (Inspector of Taxes)* [1982] AC 279, [1981] 1 All ER 736, HL; *Bond v Pickford* [1983] STC 517, CA.

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## **842. Assurances.**

On the appointment of a new trustee for the whole or any part of trust property, any assurance or thing requisite for vesting the trust property or any part of it in a sole trustee or jointly in the persons who are the trustees must be executed or done<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 37(1)(d). As to the special requirements consequent on an appointment of new trustees for the purposes of the Settled Land Act 1925 see s 35; the Trustee Act 1925 s 35(2); and SETTLEMENTS vol 42 (Reissue) PARA 759. As to the special requirements on an appointment of new trustees of land and of new trustees of any trust of the proceeds of land see the Trustee Act 1925 s 35(1), (3) (as substituted); the Law of Property Act 1925 s 24 (as substituted); para 834 ante; and SETTLEMENTS vol 42 (Reissue) PARAS 900-901. As to the vesting of trust property in new trustees see PARA 865 et seq post. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

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### **843. Powers of new trustee.**

Every new trustee appointed under the statutory provisions relating to the appointment of new or additional trustees<sup>1</sup> as well before as after all the trust property becomes by law or by assurance or otherwise vested in him has the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust<sup>2</sup>.

<sup>1</sup>     Ie under the Trustee Act 1925 s 36 (as amended): see PARA 835 et seq ante.

<sup>2</sup>     Ibid s 36(7). The powers conferred by the Trustee Act 1925 are subject to the terms of the trust instrument: see s 69(2); and PARA 603 ante.

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#### **844. Evidence as to vacancy in trusteeship.**

A statement contained in any instrument coming into operation after 31 December 1925 by which a new trustee is appointed for any purpose connected with land to the effect that a trustee has remained out of the United Kingdom<sup>1</sup> for more than 12 months, or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, is, in favour of a purchaser of a legal estate, conclusive evidence of the matter stated<sup>2</sup>; and any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment is valid in favour of such a purchaser<sup>3</sup>.

1 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

2 Trustee Act 1925 s 38(1).

3 Ibid s 38(2).

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***D. APPOINTMENT OF NEW TRUSTEES UNDER THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996***

**845. Appointment of trustee at the instance of beneficiaries.**

Where there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and the beneficiaries<sup>1</sup> under the trust are of full age and capacity and, taken together, are absolutely entitled to the property subject to the trust, they may give a written direction<sup>2</sup> to the trustees or trustee for the time being<sup>3</sup> to appoint by writing to be a trustee or trustees the person or person specified in the direction<sup>4</sup>. This may be coupled with a written direction to a trustee or trustees to retire from the trust<sup>5</sup>.

1 As to who is a beneficiary see the Trusts of Land and Appointment of Trustees Act 1996 s 22; and PARA 739 ante.

2 For the purposes of *ibid* ss 19, 20 (see PARA 846 post), a direction is given by beneficiaries if a single direction is jointly given by all of them or a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others), and none of them by writing withdraws the direction given by him before it has been complied with: s 21(1). Where more than one direction is given each must specify for appointment the same person or persons: s 21(2). A direction under these provisions must not specify a person or persons for appointment if the appointment of that person or those persons would contravene the provisions of the Trustee Act 1925 s 35(1) (as substituted) or the Law of Property Act 1925 s 24(1) (as substituted) (requirements as to identity of trustees) (see PARA 834 ante): Trusts of Land and Appointment of Trustees Act 1996 s 21(4).

3 If there are none, the direction may be given to the personal representative of the last person who was a trustee: see *ibid* s 19(2)(b).

4 *Ibid* s 19(1), (2)(b). Section 19 has effect subject to the restrictions imposed by the Trustee Act 1925 on the number of trustees (see PARAS 804, 822 ante): Trusts of Land and Appointment of Trustees Act 1996 s 19(5). Trustees appointed under these provisions have the same powers as a trustee appointed under the Trustee Act 1925 s 36 (as amended): Trusts of Land and Appointment of Trustees Act 1996 s 21(3). As to those powers see the Trustee Act 1925 s 36(7); and PARA 843 ante.

5 See the Trusts of Land and Appointment of Trustees Act 1996 s 19(2)(a); and PARA 897 post.

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#### **846. Appointment of substitute at the instance of beneficiaries for a trustee mentally disordered or lacking capacity.**

Until 1 October 2007<sup>1</sup>, where: (1) a trustee is incapable by reason of mental disorder of exercising his functions as trustee<sup>2</sup>; (2) there is no person who is both entitled and willing and able to appoint a trustee<sup>3</sup> in his place<sup>4</sup>; and (3) the beneficiaries<sup>5</sup> under the trust are of full age and capacity and, taken together, are absolutely entitled to the property subject to the trust<sup>6</sup>, then the beneficiaries may give to a receiver of the trustee, an attorney acting for him<sup>7</sup>, or a person authorised by the authority having jurisdiction under Part VII of the Mental Health Act 1983<sup>8</sup>, a written direction<sup>9</sup> to appoint by writing the person or persons specified in the direction to be a trustee or trustees in place of the incapable trustee<sup>10</sup>.

As from 1 October 2007<sup>11</sup>, where: (a) a trustee lacks capacity<sup>12</sup> to exercise his functions as trustee<sup>13</sup>; (b) there is no person who is both entitled and willing and able to appoint a trustee<sup>14</sup> in his place<sup>15</sup>; and (c) the beneficiaries<sup>16</sup> under the trust are of full age and capacity and, taken together, are absolutely entitled to the property subject to the trust<sup>17</sup>, then the beneficiaries may give to a deputy appointed for the trustee by the Court of Protection<sup>18</sup>, an attorney acting for him<sup>19</sup>, or a person authorised for the purpose by the Court of Protection, a written direction<sup>20</sup> to appoint by writing the person or persons specified in the direction to be a trustee or trustees in place of the incapable trustee<sup>21</sup>.

1 The Trusts of Land and Appointment of Trustees Act 1996 is amended by the Mental Capacity Act 2005 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2007/1897.

2 Trusts of Land and Appointment of Trustees Act 1996 s 20(1)(a).

3 I.e. under the Trustee Act 1925 s 36(1): see PARA 836 ante.

4 Trusts of Land and Appointment of Trustee Act 1996 s 20(1)(b).

5 As to who is a beneficiary see *ibid* s 22; and PARA 739 ante.

6 *Ibid* s 20(1)(c).

7 I.e. an attorney acting under the authority of a power of attorney created by an instrument which is registered under the Enduring Powers of Attorney Act 1985 s 6 (repealed as from 1 October 2007): see AGENCY vol 1 (2008) PARA 194.

8 I.e. the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; repealed as from 1 October 2007): see MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

9 See PARA 845 note 2 ante.

10 Trusts of Land and Appointment of Trustees Act 1996 s 20(2). Trustees appointed under these provisions have the same powers as a trustee appointed under the Trustee Act 1925 s 36 (as amended): Trusts of Land and Appointment of Trustees Act 1996 s 21(3). As to those powers see the Trustee Act 1925 s 36(7); and PARA 843 ante.

11 See note 1 supra.

12    le within the meaning of the Mental Capacity Act 2005: see PARA 830 note 1 ante.

13    Trusts of Land and Appointment of Trustees Act 1996 s 20(1)(a) (amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 42(1), (3)(a)).

14    See note 3 supra.

15    Trusts of Land and Appointment of Trustee Act 1996 s 20(1)(b).

16    As to who is a beneficiary see *ibid* s 22; and PARA 739 ante.

17    *Ibid* s 20(1)(c).

18    As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 750.

19    le an attorney acting under the authority of an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005 (see AGENCY vol 1 (2008) PARA 194).

20    See PARA 845 note 2 ante.

21    Trusts of Land and Appointment of Trustees Act 1996 s 20(2) (amended by the Mental Capacity Act 2005 Sch 6 para 42(1), (3)(b)). Trustees appointed under these provisions have the same powers as a trustee appointed under the Trustee Act 1925 s 36 (as amended): Trusts of Land and Appointment of Trustees Act 1996 s 21(3). As to those powers see the Trustee Act 1925 s 36(7); and PARA 843 ante.



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### **847. Trusts in relation to which beneficiaries cannot make a direction.**

The beneficiaries' powers to direct the appointment of trustees<sup>1</sup> do not apply in relation to a trust created by a disposition in so far as provision that they do not apply is made by the disposition<sup>2</sup>; nor do they apply in relation to a trust created before 1 January 1997<sup>3</sup> by a disposition in so far as provision to the effect that they do not apply is made by a deed executed<sup>4</sup>, in a case in which the trust was created by one person and he is of full capacity, by that person<sup>5</sup> or, in a case in which the trust was created by more than one person, by such of the persons who created the trust as are alive and of full capacity<sup>6</sup>.

1    Ie under the Trusts of Land and Appointment of Trustees Act 1996 ss 19, 20 (s 20 prospectively amended) (see PARA 845 et seq ante).

2    Ibid s 21(5).

3    Ie the date of commencement of the Trusts of Land and Appointment of Trustees Act 1996.

4    A deed executed for the purposes of ibid s 21(6) is irrevocable: s 21(7). Such a deed does not affect anything done before its execution to comply with a direction under s 19 or s 20 (prospectively amended), but such a direction which has been given but not complied with before execution of the deed ceases to have effect: s 21(8).

5    Ibid s 21(6)(a).

6    Ibid s 21(6)(b).

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## ***E. APPOINTMENT BY DONEE OF A POWER OF ATTORNEY***

### **848. Appointment of additional trustee.**

The donee of an enduring power of attorney<sup>1</sup> created after 1 March 2000<sup>2</sup> has been given a new but limited power to appoint new trustees. These provisions, which will apply equally to the donee of a lasting power of attorney created under the Mental Capacity Act 2005<sup>3</sup>, were designed to prevent the 'two trustee rules'<sup>4</sup> from frustrating the new power for an attorney to exercise the trustee functions of the donor<sup>5</sup>. An attorney<sup>6</sup> under a registered power for one or more trustees may<sup>7</sup> appoint an additional trustee<sup>8</sup> on behalf of the trustee or trustees<sup>9</sup>.

1 See the Enduring Powers of Attorney Act 1985; and AGENCY vol 1 (2008) PARA 194 et seq. As from 1 October 2007 the Enduring Powers of Attorney Act 1985 is repealed by the Mental Capacity Act 2005 ss 66(1)(b), (2), 67(2), Sch 7 (see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897) and therefore no enduring power of attorney is to be created after that date. However, enduring powers of attorney created before that date remain effective under the provisions of the Mental Capacity Act 2005 s 66(3), Sch 4, which has effect in place of the Enduring Powers of Attorney Act 1985: see MENTAL HEALTH vol 30(2) (Reissue) PARA 647 et seq. As to powers of attorney see AGENCY vol 1 (2008) PARA 194 et seq.

2 See the Trustee Delegation Act 1999 s 8(2); and the Trustee Delegation Act 1999 (Commencement) Order 2000, SI 2000/216. The date referred to in the text is the date of commencement of the Trustee Delegation Act 1999.

3 See note 6 infra. As to lasting powers of attorney see the Mental Capacity Act 2005 s 9; and AGENCY vol 1 (2008) PARA 217 et seq.

4 See PARA 822 ante.

5 See the Trustee Delegation Act 1999 s 1; and PARA 985 post.

6 I.e. a person who is either: (1) both a trustee and attorney for the other trustee (if one other) or for both of the other trustees (if two others), under a registered power; or (2) attorney under a registered power for the trustee (if one) or for both or each of the trustees (if two or three): see the Trustee Act 1925 s 36(6A) (added by the Trustee Delegation Act 1999 s 8). Until 1 October 2007, for these purposes, 'registered power' means a power of attorney created by an instrument which is for the time being registered under the Enduring Powers of Attorney Act 1985 s 6 (see AGENCY vol 1 (2008) PARA 194); Trustee Act 1925 s 36(6C) (added by the Trustee Delegation Act 1999 s 8). However, as from 1 October 2007, 'registered power' means an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005: Trustee Act 1925 s 36(6C) (as so added; amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (2)(a)).

7 I.e. if he intends as attorney under the power to exercise any function of the trustee or trustees by virtue of the Trustee Delegation Act 1999 s 1(1) (see PARA 985 post) or any function of the trustee or trustees in relation to any land, capital proceeds of a conveyance of land or income from land by virtue of its delegation to him under the Trustee Act 1925 s 25 (see PARA 984 post) or the instrument (if any) creating the trust: see s 36(6B) (added by the Trustee Delegation Act 1999 s 8).

8 I.e. under the Trustee Act 1925 s 36(6)(b) (as amended): see PARA 837 ante.

9 Ibid s 36(6A) (as added: see note 6 supra). This provision applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney (or, where there are more than one, any of them) or the instrument (if any) creating the trust, and has effect subject to the terms of those instruments: s 36(6D) (added by the Trustee Delegation Act 1999 s 8).

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## **F. APPOINTMENT OF NEW TRUSTEES BY THE COURT**

### **(A) IN GENERAL**

#### **849. Power of the court to appoint.**

The court<sup>1</sup> may, whenever it is expedient to appoint a new trustee or new trustees<sup>2</sup> and it is found inexpedient, difficult or impracticable to do so without the assistance of the court<sup>3</sup>, make an order for the appointment of a new trustee or new trustees either (1) in substitution for or in addition to any existing trustee or trustees; or (2) although there is no existing trustee<sup>4</sup>.

1 For the meaning of 'the court' see PARA 632 note 3 ante. As to jurisdiction and procedure see PARA 632 et seq ante.

2 In particular the court may appoint a new trustee in substitution for a trustee who is suffering from a mental disorder or who lacks capacity to exercise his functions as trustee, or a bankrupt, or a corporation which is in liquidation or has been dissolved: see PARA 856 post. See further PARA 851 post.

3 Where a sole or continuing trustee is desirous of exercising his statutory power of appointment, an application to the court, although made by a majority of the beneficiaries, and although the trustee has no beneficial interest under the trust, will normally be refused: *Re Higginbottom*[1892] 3 Ch 132. See, however, *Re Kensit* [1908] WN 235 (where an order was made for the appointment of the Public Trustee (see PARA 766 et seq ante), although the continuing trustee was willing to exercise his powers of appointment by appointing a private trustee to act with him); *Re Rendell's Trusts* (1915) 139 LT Jo 249 (where a new trustee was appointed, although the appointment was opposed by one of the surviving trustees). Generally, the court will not appoint a new trustee where the appointment can be made under a power in the instrument of trust or under the statutory power: *Re Soulby's Trusts* (1873) 21 WR 256; *Re Gibbon's Trusts* (1882) 45 LT 756; *Re Sutton* [1885] WN 122. See, however, *Re Jackson's Trusts* (1868) 16 WR 572; *Re Shafro's Trusts* (1885) 29 ChD 247. In *Re May's Will Trusts, May and Stanford v Burch* [1941] Ch 109, the court appointed a new trustee in place of one in enemy occupied territory. See also *Mohammed v Khan*[2005] EWHC 599 (Ch), [2005] All ER (D) 41 (Feb), where the court was willing to appoint trustees in the place of an interim body of management trustees where serious dispute caused one trustee to refuse to recognise the existence of another.

4 Trustee Act 1925 s 41(1). A new trustee may be appointed under the Trustee Act 1925 notwithstanding that the trustees have no trust property vested in them: *Re Boyce, Re Blackwood's Trusts* (1864) 4 De GJ & Sm 205 at 208-209 per Lord Westbury LC. Where there is no dispute of fact, the court has jurisdiction to displace a trustee against his will and appoint a new trustee in substitution for him: *Re Henderson, Henderson v Henderson*[1940] Ch 764, [1940] 3 All ER 295; *Re A Solicitor*[1952] Ch 328, [1952] 1 All ER 133. The court will not generally replace a trustee against his will unless he has failed to discharge his duties as trustee: see *Baker v Selby Town Council*[2000] All ER (D) 1521. The fact that a trustee has security for costs may be a reason for delaying the appointment of new trustees until the question of costs has been settled: *Re Pauling's Settlement Trusts (No 2)*, *Younghusband v Coutts & Co*[1963] Ch 576, [1963] 1 All ER 857. All the powers and provisions contained in the Trustee Act 1925 with reference to the appointment of new trustees apply to and include trustees for the purposes of the Settled Land Act 1925 and trustees for the purpose of the management of land during a minority, whether appointed by the court or by the settlement or under provisions contained in any instrument: Trustee Act 1925 s 64(1). As to trustees for the management of land during a minority see the Settled Land Act 1925 s 102 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 665. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante. The Trustee Act 1925 applies to charities: see *Re Coates to Parsons* (1886) 34 ChD 370 (decided under the corresponding provision of the Conveyancing Act 1881 s 31 (repealed)); and CHARITIES. For the meaning of 'instrument' see PARA 817 note 5 ante; for the meaning of 'land' see PARA 605 note 5 ante; and for the meaning of 'settlement' see PARA 804 note 1 ante.



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### **850. Number of trustees appointed.**

In appointing new trustees, the court does not confine itself to the original number<sup>1</sup> or insist on filling up the original number<sup>2</sup>, but it does not appoint a sole trustee where originally there were more than one<sup>3</sup>. If there are two or more continuing trustees, the court has in some cases authorised the continuing trustees to carry on the trust without appointing a new trustee to act with them<sup>4</sup>.

1 *Re Welch* (1838) 3 My & Cr 292; *Birch v Cropper* (1848) 2 De G & Sm 255; *Re Tunstall's Will, ex p Tunstall* (1851) 4 De G & Sm 421; *Plenty v West* (1853) 16 Beav 356; *Re Boyce, Re Blackwood's Trusts* (1864) 4 De GJ & Sm 205. See generally para 840 ante.

2 *Bulkeley v Earl of Eglinton* (1855) 1 Jur NS 994; *Re Marriott's Settlement* (1868) 18 LT 749; *Re Fowler's Trusts* (1886) 55 LT 546. A sole trustee can act alone in all matters involving no receipt of capital money: *Re Myhill, Hull v Myhill* [1928] Ch 100.

3 *Re Dickinson's Trusts* (1855) 1 Jur NS 724; *Re Ellison's Trust* (1856) 2 Jur NS 62. The court will never vest a minor's trust fund in a sole trustee (see *Re Dickinson's Trusts* supra), but a sole new trustee has been appointed where there was only one trustee originally and the trust would shortly come to an end (see *Re Reynault* (1852) 16 Jur 233). It appears that, as far as jurisdiction is concerned, the court may now appoint two trustees, or even a sole trustee, notwithstanding a direction in the trust instrument that the number should never be reduced below three: *Re Leslie's Hassop Estates* [1911] 1 Ch 611. Where, however, any enactment requires a minimum of two trustees or a trust corporation (see PARAS 804, 822 ante), the court will not, it is assumed, appoint less than two trustees except where it appoints a trust corporation.

4 *Re Leon* [1892] 1 Ch 348, CA; *Re Price* [1894] WN 169; *Dugmore v Suffield* [1896] WN 50; *Re Lees' Settlement Trusts* [1896] 2 Ch 508; *Re Fitzherbert's Settlement Trusts* [1898] WN 58. Under former statutes the court would not generally sanction in this way a reduced number of trustees in the case of a continuing trust (*Re Lamb's Trusts* (1884) 28 ChD 77; *Re Gardiner's Trusts* (1886) 33 ChD 590), but only when distribution of the trust fund was imminent or there were other special circumstances (*Re Watson* (1881) 19 ChD 384; *Re Martyn, Re Toutt's Will* (1884) 26 ChD 745; *Davies v Hodgson* (1886) 32 ChD 225).

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### **851. Appointment where trustee is mentally disordered or lacks capacity.**

Until 1 October 2007<sup>1</sup>, the court may appoint a new trustee in substitution for a trustee incapable by reason of mental disorder<sup>2</sup>; but in certain instances the authority having jurisdiction under Part VII of the Mental Health Act 1983<sup>3</sup> has concurrent jurisdiction with the High Court to appoint the new trustee<sup>4</sup>.

As from 1 October 2007<sup>5</sup>, the court may appoint a new trustee in substitution for a trustee who lacks capacity to exercise his functions as trustee<sup>6</sup>; but in certain instances the Court of Protection<sup>7</sup> has concurrent jurisdiction with the High Court to appoint the new trustee<sup>8</sup>.

1 The Trustee Act 1925 is amended by the Mental Capacity Act 2005 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

2 As to the appointment of a new trustee in such circumstances see PARA 849 ante.

3 I.e. the Mental Health Act 1983 Pt VII (ss 93-113) (as amended): see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

4 See the Trustee Act 1925 s 54 (as substituted and amended); and MENTAL HEALTH vol 30(2) (Reissue) PARA 721 et seq.

5 See note 1 supra.

6 As to the appointment of a new trustee in such circumstances see PARA 849 ante.

7 As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 750.

8 See the Trustee Act 1925 s 54 (as substituted and amended); note 1 supra; and MENTAL HEALTH vol 30(2) (Reissue) PARA 721 et seq.

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## **852. Persons who may apply and service of applications.**

An order for the appointment of a new trustee may be made on the application<sup>1</sup> of any person beneficially interested under the trust, whether under disability or not, or of any person duly appointed trustee<sup>2</sup>. Where all the parties interested do not join in the application, it is usual to serve the application upon the other persons who are interested in the trust either as trustees or beneficiaries<sup>3</sup>.

1 As to courts and procedure generally see PARA 632 et seq ante.

2 Trustee Act 1925 s 58(1). Cf *Re Price* [1894] WN 169. The application may be made by a person who has a contingent interest in the trust property: *Re Sheppard's Trusts* (1862) 4 De GF & J 423. The president and secretary of the Wesleyan Conference were held capable of applying for the appointment of new trustees of a Wesleyan chapel: *Re Harden Wesleyan Chapel* (1853) 1 WR 212.

3 *Re Lonsdale's Trust* (1850) 14 Jur 1101; *Thomas' Trust* (1851) 15 Jur 187; *Re Maynard's Settlement Trusts* (1852) 16 Jur 1084; *Re Richard's Trust* (1852) 5 De G & Sm 636; *Re Sloper* (1854) 18 Beav 596; *Re Fellows' Settlement* (1856) 2 Jur NS 62; *Re Blanchard* (1861) 3 De GF & J 131 at 137 per Turner LJ. The court may, however, dispense with this service where good reason is shown for so doing: *Re Smyth's Settlement* (1851) 2 De G & Sm 781; *Re Richard's Trust* supra at 637 per Parker V-C; *Re Blanchard* supra at 137; *Re Lightbody's Trusts* (1884) 33 WR 452; *Re Wilson* (1886) 31 ChD 522, CA. The application need not be served on a trustee who has absconded (*Re Harrison's Trusts* (1852) 22 LJ Ch 69; *Hyde v Benbow* [1884] WN 117), or who is permanently resident abroad (*Re Stewart* (1860) 8 WR 297; *Re Bignold's Settlement Trusts* (1872) 7 Ch App 223; *Re Pye's Trusts* (1880) 42 LT 247).

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### **853. Costs of application for order.**

The court may order the costs and expenses of and incident to an application for an order appointing a new trustee to be raised and paid out of the property in respect of which the order is made or out of the income of such property, or to be borne and paid in such manner and by such persons as to the court may seem just<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 60. As to the entitlement of trustees to their costs out of the trust fund see CPR 48.4; and PARA 906 et seq post. See further *Re Fellows' Settlement* (1856) 2 Jur NS 62; *Re Parby's Marriage Settlement Trusts* (1857) 29 LTOS 72; *Re Primrose* (1857) 23 Beav 590; *Turner v Mullineux* (1861) 9 WR 252; *Re Grant's Trusts* (1862) 2 John & H 764 (costs apportioned rateably between two funds); *Re Wills* (1863) 12 WR 97; *Re Crabtree* (1866) 14 WR 497; *Re Brackenbury's Trusts* (1870) LR 10 Eq 45; *Re Wiseman's Trusts* (1870) 18 WR 574; *Re Pring's Trusts* (1873) 28 LT 467; *Re Spettigue's Trusts* (1884) 32 WR 385; *Re Knight's Will* (1884) 26 ChD 82, CA; *Re Rendell's Trusts* (1915) 139 LT Jo 249 (trustee not ordered to pay any costs; refusal to assent to the appointment of trustees held to be unreasonable).



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#### **854. Powers of trustee appointed by the court.**

Every trustee appointed by a court of competent jurisdiction has, as well before as after the trust property becomes by law or by assurance or otherwise vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust<sup>1</sup>.

An order appointing a new trustee or new trustees<sup>2</sup>, and any consequential vesting order<sup>3</sup> or conveyance, does not operate as a discharge to any former or continuing trustee further or otherwise than an appointment of new trustees under any power for that purpose contained in an instrument of trust would have operated<sup>4</sup>.

1 Trustee Act 1925 s 43; and see *Re Smith, Eastick v Smith* [1904] 1 Ch 139 at 144 per Farwell J. The powers conferred by the Trustee Act 1925 are subject to the terms of the trust instrument: see s 69(2); and PARA 603 ante.

2 ie an order under *ibid* s 41 (as amended): see PARA 849 ante.

3 As to vesting orders see PARA 869 et seq post.

4 Trustee Act 1925 s 41(3).

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## (B) CASES IN WHICH APPOINTMENT MAY BE MADE

### **855. Where there is no trustee.**

Where the will creating the trust contains no power to appoint new trustees and no trustee named in the will is alive when the will comes into operation, an application to the court to appoint new trustees is necessary since there is no one who is enabled under the statutory power of appointment<sup>1</sup> to make the appointment<sup>2</sup>.

<sup>1</sup> See the Trustee Act 1925 s 36 (as amended); and PARA 835 et seq ante.

<sup>2</sup> *Re Orde*(1883) 24 ChD 271, CA; *Re Lightbody's Trusts* (1884) 33 WR 452; *Re Ambler's Trusts* (1888) 59 LT 210; *Nicholson v Field*[1893] 2 Ch 511.

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## **856. Where trustee is mentally disordered or lacks capacity.**

Until 1 October 2007<sup>1</sup>, the court may, without prejudice to the generality of its power to appoint new trustees<sup>2</sup>, make an order for the appointment of a new trustee in substitution for a trustee who is incapable of exercising his functions as a trustee by reason of mental disorder<sup>3</sup> or is a bankrupt or is a corporation which is in liquidation or has been dissolved<sup>4</sup>.

As from 1 October 2007<sup>5</sup>, there is a similar power in relation to a trustee who lacks capacity to exercise his functions as trustee<sup>6</sup>.

1 The Trustee Act 1925 is amended by the Mental Capacity Act 2005 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

2 As to the appointment of trustees by the court see PARA 849 et seq ante.

3 le within the meaning of the Mental Health Act 1983 (definition prospectively repealed): see MENTAL HEALTH vol 30(2) (Reissue) PARA 402. As to an appointment to replace a mentally disordered trustee see further PARA 851 ante.

4 Trustee Act 1925 s 41(1) (amended by the Criminal Law Act 1967 s 10, Sch 3 Pt III; and the Mental Health Act 1959 s 149(1), Sch 7 Pt I).

5 See note 1 supra.

6 See the Trustee Act 1925 s 41(1) (as amended (see note 4 supra); and further amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (3)). See note 1 supra. As to an appointment in substitution for a trustee lacking capacity see further PARA 851 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(ii) Appointment of New Trustees/F. APPOINTMENT OF NEW TRUSTEES BY THE COURT/(B) Cases in which Appointment may be made/857. Inability of court to appoint person to be executor or administrator.

### **857. Inability of court to appoint person to be executor or administrator.**

The statutory provisions conferring power on the court to appoint new trustees<sup>1</sup> do not give power to appoint an executor or administrator<sup>2</sup>. Where, however, an application relating to the estate of a deceased person is made to the High Court by or on behalf of a personal representative of the deceased or a beneficiary<sup>3</sup> of the estate, the court may in its discretion:

- 148 (1) appoint a person (a 'substituted personal representative') to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them<sup>4</sup>; or
- 149 (2) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons<sup>5</sup>.

Where the court appoints a person to act as a substituted personal representative of a deceased person:

- 150 (a) if that person is appointed to act with an executor or executors, the appointment, except for the purpose of including him in any chain of representation, constitutes him executor of the deceased as from the date of the appointment<sup>6</sup>; and
- 151 (b) in any other case the appointment constitutes that person administrator of the deceased's estate as from the date of the appointment<sup>7</sup>.

The court may authorise a person appointed as a substituted personal representative to charge remuneration for his services as such, on such terms, whether or not involving the submission of bills of charges for taxation by the court, as the court may think fit<sup>8</sup>.

Where an application relating to the estate of a deceased person is so made to the court, the court may, if it thinks fit, proceed as if the application were, or included, an application for the appointment of a judicial trustee<sup>9</sup> in relation to that estate<sup>10</sup>.

1 le the Trustee Act 1925 s 41 (as amended): see PARA 849 et seq ante.

2 Ibid s 41(4). See also *Re Willey* [1890] WN 1, CA; *Eaton v Daines* [1894] WN 32. Where, however, an executor or administrator has cleared the estate and has assented to a settled legacy, the court can appoint new trustees to act jointly with him or in his place: *Re Ponder, Ponder v Ponder* [1921] 2 Ch 59. Cf *Pollock v Ennis* [1921] 1 IR 181. So, too, where an administrator has cleared the estate and holds property in trust for the persons entitled on intestacy, the court can appoint new trustees in his place: *Re Yerburch, Yerburch v Yerburch* [1928] WN 208. Cf *Re Pitt, Pitt v Mann* (1928) 44 TLR 371 (where an administrator with the will annexed cleared the estate and appointed new trustees, and the appointment was held to be valid); *Re Cockburn's Will Trusts, Cockburn v Lewis* [1957] Ch 438, [1957] 2 All ER 522 (where the administrator with the will annexed who had cleared the estate had power to appoint new trustees). However, the legal estate in any land remains outstanding in the administrator or executor until he executes a written assent in favour of the new trustees: *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833 (not followed in the Irish case *Mohan v Roche* [1991] 1 IR 560). See PARA 866 note 1 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 564. Trustees so appointed out of court can exercise any powers conferred by the testator by his will on his trustees: see *Re Cockburn's Will Trusts, Cockburn v Lewis* supra.

3 For these purposes, 'beneficiary', in relation to the estate of a deceased person, means a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate: Administration of Justice Act 1985 s 50(5).

4 Ibid s 50(1)(a).

5 Ibid s 50(1)(b). See also the Supreme Court Act 1981 s 114(4); the Administration of Estates Act 1925 s 23(2); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 236. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force); see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

6 Administration of Justice Act 1985 s 50(2)(a).

7 Ibid s 50(2)(b).

8 Ibid s 50(3).

9 Ie under the Judicial Trustees Act 1896: see PARA 757 et seq ante.

10 Administration of Justice Act 1985 s 50(4).

## **UPDATE**

### **857 Inability of court to appoint person to be executor or administrator**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(ii) Appointment of New Trustees/F. APPOINTMENT OF NEW TRUSTEES BY THE COURT/(B) Cases in which Appointment may be made/858. Appointment as to part of trust.

### **858. Appointment as to part of trust.**

When it is expedient to do so, the court allows trustees to retire from a part of the trust and appoints new trustees of that part without appointing a new trustee of the residue<sup>1</sup>.

<sup>1</sup> *Re Cotterill's Trusts* [1869] WN 183; *Re Cunard's Trusts* (1878) 48 LJ Ch 192; *Re Hetherington's Trusts* (1886) 34 ChD 211; *Re Moss's Trusts* (1888) 37 ChD 513; *Re Aston's Trusts* (1890) 25 LR Ir 96. See the Trustee Act 1925 s 37 (as amended); and PARA 840 ante. It is not clear, however, whether s 37 (as amended) applies to an appointment by the court, although it seems to have been assumed that the original provision in the Conveyancing Act 1882 s 5 (repealed) did so apply: see *Re Paine's Trusts* (1885) 28 ChD 725; *Re Hetherington's Trusts* supra; but see *Re Moss's Trusts* supra.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(ii) Appointment of New Trustees/F. APPOINTMENT OF NEW TRUSTEES BY THE COURT/(B) Cases in which Appointment may be made/859. Additional trustee.

### **859. Additional trustee.**

The court may appoint an additional new trustee when there is no vacancy in the number of trustees<sup>1</sup>; but, where there is a statutory restriction as to the maximum number of trustees<sup>2</sup>, the court will not exceed that maximum. There is, however, no absolute right in beneficiaries to require the court to appoint an additional trustee where the settlor or testator has thought fit to appoint a sole trustee and that trustee continues to act<sup>3</sup>, unless the sole trustee, if left by himself, would be unable to give a good receipt for capital money<sup>4</sup>.

1 See the Trustee Act 1925 s 41 (as amended); and PARA 849 et seq ante. In a proper case the costs of the appointment have been thrown on the corpus of the trust property (*Grant v Grant* (1865) 34 Beav 623); but, where the additional trustee was applied for by one beneficiary and opposed by another, the costs were ordered to be paid by the applicant (*Re Brackenbury's Trusts* (1870) LR 10 Eq 45).

2 As to such limitation on the number of trustees see PARAS 804, 822 ante.

3 *Re Badger, Badger v Woolley* (1915) 84 LJ Ch 567.

4 See PARA 822 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(ii) Appointment of New Trustees/F. APPOINTMENT OF NEW TRUSTEES BY THE COURT/(C) Who may be appointed New Trustee/860. Principles on which appointment made.

### (C) WHO MAY BE APPOINTED NEW TRUSTEE

#### **860. Principles on which appointment made.**

In all cases of appointment by the court of a new trustee the court has regard to the wishes of the creator of the trust if expressed in or to be inferred from the instrument creating the trust<sup>1</sup> and to the question whether the appointment will promote or impede the execution of the trust<sup>2</sup>, and will not appoint a trustee with a view to the interests of some of the beneficiaries in opposition to those of others<sup>3</sup>.

1 *Re Tempest*(1866) 1 Ch App 485 at 487 per Turner LJ. The court will not appoint a person or the nominee of a person whom the creator of the trust has evidently intended to exclude from all interest in or connection with the trust property: see *Re Tempest* supra at 487-488 (where the proposed appointee was nominated by a relative of the testator with whom the testator was on bad terms). Cf *Re Badger, Badger v Woolley* (1915) 84 LJ Ch 567 (where a sole trustee was originally appointed).

2 *Re Tempest*(1866) 1 Ch App 485 at 488. See also *Mohammed v Khan*[2005] EWHC 599 (Ch), [2005] All ER (D) 41 (Feb) (the court appointed trustees in the place of an interim body of management trustees, the trustees to be nominated by the parties to the action who were themselves barred from being nominees for a period of two years because disputes between them were impeding the execution of the trust).

3 *Re Tempest*(1866) 1 Ch App 485 at 487.



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### **861. Beneficiary.**

A beneficiary or the spouse of a beneficiary under the trust will not be appointed a trustee by the court<sup>1</sup> except where a suitable independent person cannot be found to undertake the office<sup>2</sup> or there are other special circumstances<sup>3</sup>. In that case an undertaking has been required from the person appointed that, if he becomes sole trustee, he will use every endeavour to obtain the appointment of a co-trustee<sup>4</sup>.

1 *Ex p Clutton* (1853) 17 Jur 988 at 989 per Wood V-C; *Ex p Conybeare's Settlement* (1853) 1 WR 458 per Turner LJ. See also *Re Hattatt's Trusts* (1870) 18 WR 416; *Forster v Abraham* (1874) LR 17 Eq 351; *Re Parrott* (1881) 30 WR 97; *Re Coode, Coode v Forster* (1913) 108 LT 94.

2 *Ex p Clutton* (1853) 17 Jur 988; *Re Clissold's Settlement* (1864) 10 LT 642; *Re Burgess' Trusts* [1877] WN 87; *Re Parrott* (1881) 30 WR 97; *Re Lightbody's Trusts* (1884) 33 WR 452.

3 *Ex p Conybeare's Settlement* (1853) 1 WR 458; *Re Curtis's Trust and Trustee Acts 1850, 1852* (1871) IR 5 Eq 429.

4 *Re Hattatt's Trusts* (1870) 18 WR 416; *Re Burgess' Trusts* [1877] WN 87; *Re Lightbody's Trusts* (1884) 33 WR 452.

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## **862. Solicitor.**

As a rule the court does not appoint as a new trustee the solicitor to the beneficiary for life under the trust<sup>1</sup> or the solicitor to the existing trustee<sup>2</sup>.

1 *Re Kemp's Settled Estates* (1883) 24 ChD 485, CA; *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288 at 298 et seq per Stirling J; *Re Spencer's Settled Estates* [1903] 1 Ch 75. See also *Re Orde* (1883) 24 ChD 271, CA; and PARAS 831-834 ante. The appointment will, however, nevertheless be made if a contrary course would be inconvenient: *Re Brentnall's Trusts* [1872] WN 77; *Re Marquis of Ailesbury and Lord Iveagh* [1893] 2 Ch 345 at 359-360 per Stirling J (where it was convenient to appoint, as new trustees, the persons who were trustees of another settlement relating to the trust property and of whom the solicitor was one); *Re Spencer's Settled Estates* supra at 82 per Byrne J.

2 *Re Norris, Allen v Norris* (1884) 27 ChD 333 at 340 per Pearson J.

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### **863. Alien or person out of jurisdiction.**

An alien or person residing out of the jurisdiction is not appointed as a new trustee<sup>1</sup> unless special circumstances, such as the residence of the beneficiaries out of the jurisdiction, render his appointment expedient<sup>2</sup>. When the court is invited to exercise an original discretion of its own, the applicants must make out a positive case for the court to exercise its discretion as they request<sup>3</sup>.

1 *Re Guibert's Trust Estate* (1852) 16 Jur 852; *Re Drewe's Settlement Trusts* [1876] WN 168 per Malins V-C.

2 *Re Hill's Trusts* [1874] WN 228; *Re Drewe's Settlement Trusts* [1876] WN 168; *Re Austen's Settlement* (1878) 38 LT 601; *Re Cunard's Trusts* (1878) 48 LJ Ch 192; *Re Liddiard* (1880) 14 ChD 310 (as to which see *Re Seale's Marriage Settlement* [1961] Ch 574 at 580, [1961] 3 All ER 136 at 140); *Re Freeman's Settlement Trusts* (1887) 37 ChD 148; *Re Windeatt's Will Trusts* [1969] 2 All ER 324, [1969] 1 WLR 692; *Re Weston's Settlements, Weston v Weston* [1969] 1 Ch 223, [1968] 3 All ER 338, CA; *Re Whitehead's Will Trusts, Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833.

3 *Richards v Mackay* (1987) 11 Tru LI 23; *Re Beatty's Will Trusts (No 2)* (1987) 11 Tru LI 77. As to approval by the court of a proposed appointment by the trustees see PARA 833 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(ii) Appointment of New Trustees/F. APPOINTMENT OF NEW TRUSTEES BY THE COURT/(C) Who may be appointed New Trustee/864. Corporation.

### **864. Corporation.**

A corporation could always be appointed an original trustee but, as a corporation could not formerly be a joint tenant with a natural person, it was not practicable to appoint a corporation to act with other trustees. A corporation is now empowered by statute to hold property as joint tenant and may consequently be a trustee jointly with others<sup>1</sup>. The court therefore has power to appoint a corporation to act as trustee either alone or jointly with others<sup>2</sup>.

<sup>1</sup> See the Bodies Corporate (Joint Tenancy) Act 1899 s 1; and PARA 609 note 5 ante.

<sup>2</sup> In exercise of the power conferred by the Trustee Act 1925 s 41(1) (as amended) to appoint 'a new trustee or new trustees': see PARAS 833, 849 ante. Cf *Re Thompson's Settlement Trusts*, *Thompson v Alexander* [1905] 1 Ch 229. The view expressed by North J in *Re Brogden*, *Billing v Brogden* [1888] WN 238, that he had no power to appoint a corporation as trustee, cannot be supported. It is now common practice for a bank to be appointed trustee, and it is no objection to the appointment of a bank as trustee that one or more of the beneficiaries happen to be its customers: *Re Northcliffe's Settlements* [1937] 3 All ER 804, CA. As to trust corporations see PARA 798 et seq ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(iii) Vesting Trust Property in New Trustees/865. Necessity for vesting.

### **(iii) Vesting Trust Property in New Trustees**

#### **865. Necessity for vesting.**

On an appointment of new trustees the trust property ought to be vested in all the persons who, after the appointment, are the trustees<sup>1</sup>. The transfer by which this is effected, although it is often made previously to or by the same instrument as the appointment, ought, in strictness, to be made only after the appointment has been completed<sup>2</sup>. The court may make a vesting order as to trust property if it is necessary or expedient to do so<sup>3</sup>.

1 *Noble v Meymott* (1851) 14 Beav 471 at 478 per Romilly MR.

2 *Noble v Meymott* (1851) 14 Beav 471 at 478 per Romilly MR. A refusal to transfer trust funds to new trustees is not justified by the fact that no transfer has been made to them of other trust funds which ought to have been so transferred: *Noble v Meymott* supra at 479.

3 As to vesting orders see PARA 869 et seq post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(iii) Vesting Trust Property in New Trustees/866. Vesting of property by vesting declaration.

### **866. Vesting of property by vesting declaration.**

Where a deed by which a new trustee is appointed to perform a trust contains a declaration by the appointor to the effect that any estate or interest in any land<sup>1</sup> or chattel subject to the trust, or right to recover or receive any debt or other thing in action subject to the trust, is to vest in the persons who by virtue of the deed become or are the trustees for performing the trust, then without any conveyance or assignment the deed operates to vest in those persons as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates<sup>2</sup>. A deed of appointment made after 31 December 1925 which does not contain such a declaration operates, subject to any express provision to the contrary contained in it, as if it had contained such a declaration by the appointor extending to all the estates, interests and rights with respect to which a declaration could have been made<sup>3</sup>.

Similarly, where by a deed a retiring trustee is discharged under the provisions contained in the Trustee Act 1925<sup>4</sup> or the Trusts of Land and Appointment of Trustees Act 1996<sup>5</sup> without a new trustee being appointed, then, if the deed contains a like declaration by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed, without any conveyance or assignment, operates to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest or right to which the declaration relates<sup>6</sup>. Such a deed, if it is made after 31 December 1925 and does not contain such a declaration, operates, subject to any express provision to the contrary contained in it, as if it had contained such a declaration made by the appropriate persons extending to all the estates, interests and rights with respect to which a declaration could have been made<sup>7</sup>. Even though the estate, interest or right to be vested by the express vesting declaration, whenever made, is not expressly referred to, the declaration, if the other statutory requirements are complied with, operates and is deemed always to have operated to vest in the appropriate persons<sup>8</sup> such estates, interests and rights as are capable of being and ought to be vested in those persons<sup>9</sup>.

1 In *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833, Pennycuik J held that these provisions do not apply to land held by personal representatives, even though they have completed administration of the deceased's property, if they have not expressly assented in writing to the vesting of the legal estate in themselves in their new capacity as trustees. This decision was not followed in the Irish case *Mohan v Roche* [1991] 1 IR 560. For the meaning of 'land' see PARA 605 note 5 ante.

2 Trustee Act 1925 s 40(1)(a). See also *London and County Banking Co v Goddard* [1897] 1 Ch 642 (trust of the legal estate in the case of an equitable mortgage). An instrument in writing may suffice in the case of the property of a trade union or an unincorporated employers' association: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 13, 129(1)(b); and EMPLOYMENT vol 40 (2009) PARAS 875, 1035. As to things in action see CHOSER IN ACTION vol 13 (2009) PARA 1 et seq.

3 Trustee Act 1925 s 40(1)(b).

4 Ie under *ibid* s 39 (as amended): see PARA 891 post.

5 Ie under the Trusts of Land and Appointment of Trustees Act 1996 s 19: see PARA 897 post.

6 Trustee Act 1925 s 40(2)(a) (s 40(2) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(14)).

7 Trustee Act 1925 s 40(2)(b) (as amended: see note 6 supra).

8     le the persons referred to in *ibid* s 40(1), (2) (as amended).

9     *Ibid* s 40(3). This provision is, however, without prejudice to any express provision to the contrary contained in the deed of appointment or discharge: s 40(3).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(iii) Vesting Trust Property in New Trustees/867. Property to which vesting declaration does not extend.

## **867. Property to which vesting declaration does not extend.**

The vesting declaration<sup>1</sup> does not extend to:

- 152 (1) land conveyed by way of mortgage<sup>2</sup> for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock<sup>3</sup>;
- 153 (2) land held under a lease<sup>4</sup> which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture<sup>5</sup>;
- 154 (3) any share, stock<sup>6</sup>, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament<sup>7</sup>.

1 le the declaration under the Trustee Act 1925 s 40 (as amended): see PARA 866 ante.

2 For these purposes, 'mortgage' includes a charge by way of legal mortgage, and relates to every estate and interest regarded in equity as merely a security for money: *ibid* s 68(1) PARA (7).

3 *Ibid* s 40(4)(a).

4 For these purposes, 'lease' includes an underlease and an agreement for a lease or underlease: *ibid* s 40(4).

5 *Ibid* s 40(4)(b).

6 For the meaning of 'stock' see PARA 884 note 2 post.

7 Trustee Act 1925 s 40(4)(c). The property of a trade union and an unincorporated employers' association is not subject to these limits: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 13, 129(1)(b); and EMPLOYMENT vol 40 (2009) PARAS 875, 1035.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(2) APPOINTMENT OF TRUSTEES/(iii) Vesting Trust Property in New Trustees/868. Registered land.

### **868. Registered land.**

The Land Registry must recognise and give effect to vesting declarations although the legal estate will not pass until effect is given to the vesting declaration on the register<sup>1</sup>. This will require investigation of the authority of the appointor executing the declaration. It is thus more expedient for the old trustees simply to execute a transfer in favour of the new trustees<sup>2</sup>.

<sup>1</sup> See the Land Registration Act 2002 s 27(1), (5); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 911 et seq.

<sup>2</sup> See Ruoff and Roper *Registered Conveyancing* para 37.011.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/869. Powers of the court.

### **(3) VESTING ORDERS**

#### **(i) In general**

#### **869. Powers of the court.**

The High Court and, in cases within its jurisdiction, a county court<sup>1</sup> may make a vesting order<sup>2</sup> as to trust property and as to property which, for the purposes of the powers to make such an order, is deemed to be held by a person as a trustee<sup>3</sup> where it is impossible or difficult to deal with the property without such order<sup>4</sup>.

1 See the Trustee Act 1925 s 67(1) (as amended); and PARA 632 ante. As to the jurisdiction of the High Court see PARA 632 ante; and as to the jurisdiction of county courts see PARA 642 ante.

2 As to the giving of effect to vesting orders in the case of registered land see LAND REGISTRATION vol 26 (2001 Reissue) PARA 911. As to vesting orders in relation to mortgages see PARA 882 post; and MORTGAGE vol 77 (2010) PARAS 605, 625. As to vesting orders in relation to property in which a minor is interested see *ibid* s 53; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 71. As to the making of vesting orders in relation to the property of persons suffering from a mental disorder or lacking capacity within the meaning of the Mental Capacity Act 2005 see MENTAL HEALTH vol 30(2) (Reissue) PARA 723 et seq. As to the effect of vesting orders see PARAS 877-878 post.

3 For the meaning of 'trustee' see PARA 601 ante.

4 As to vesting orders of land generally see PARA 875 et seq post. As to vesting orders of stock or things in action see PARA 884 et seq post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/870. Extent of powers.

### **870. Extent of powers.**

The court's powers to make vesting orders extend to all property in any part of Her Majesty's dominions except Scotland<sup>1</sup>, and may be exercised for vesting any interest in land<sup>2</sup>, stock<sup>3</sup> or thing in action in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the court under its general or statutory jurisdiction<sup>4</sup>. In charity proceedings the Charity Commission has concurrent jurisdiction with the High Court to make vesting orders<sup>5</sup>.

The provisions of the Trustee Act 1925 bind the Crown, and accordingly a vesting order made under the Act is effective, notwithstanding that the Crown has a beneficial interest in the property concerned<sup>6</sup>.

<sup>1</sup> Trustee Act 1925 s 56. For the meaning of 'Her Majesty's dominions' see COMMONWEALTH vol 13 (2009) PARA 707.

<sup>2</sup> For the meaning of 'land' see PARA 605 note 5 ante.

<sup>3</sup> For the meaning of 'stock' see PARA 884 note 2 post.

<sup>4</sup> Trustee Act 1925 s 52; and see *Re Breary* [1873] WN 48. As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

<sup>5</sup> As to the power of the Charity Commission to make orders with respect to the vesting in or transfer to charity trustees of any property see CHARITIES vol 8 (2010) PARA 289.

<sup>6</sup> See the Trustee Act 1925 s 71(4); and PARA 603 note 1 ante. The cases decided on the Trustee Act 1893 (repealed), eg *Re Taylor's Agreement Trusts* [1904] 2 Ch 737, to the contrary effect have ceased to be applicable. As to orders respecting the private estates of the Crown see CROWN PROPERTY vol 12(1) (Reissue) PARA 354 et seq.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/871. Procedure for applying for a vesting order.

**871. Procedure for applying for a vesting order.**

An application to the High Court for a vesting order is begun using the Part 8 procedure<sup>1</sup>.

<sup>1</sup> See CPR Pt 8; and CIVIL PROCEDURE vol 11 (2009) PARA 127.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/872. Persons who may apply for orders and persons to be served.

## **872. Persons who may apply for orders and persons to be served.**

An order concerning any interest in land<sup>1</sup>, stock<sup>2</sup> or thing in action subject to a trust may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee of it<sup>3</sup>. All the beneficiaries and the persons in whom the property is vested should either join in the application or be served with it<sup>4</sup>, unless owing to their absence from the jurisdiction or otherwise there is good reason to the contrary<sup>5</sup>.

1 For the meaning of 'land' see PARA 605 note 5 ante.

2 For the meaning of 'stock' see PARA 884 note 2 post.

3 Trustee Act 1925 s 58(1). As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

4 *Re Prescott's Trust* (1852) 19 LTOS 371.

5 *Re Blanchard's Estate* (1863) 2 New Rep 386; *Re Stanley* (1893) 62 LJ Ch 469. As to the position where the beneficiary is a person suffering from mental incapacity see *Re Bourke* (1864) 2 De GJ & Sm 426.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/873. Costs of application.

### **873. Costs of application.**

The court may order the costs and expenses of and incident to an application for a vesting order, or of and incident to any such order or any conveyance or transfer in pursuance of it, to be raised and paid out of the property in respect of which the order is made or out of the income of such property, or to be borne and paid in such manner and by such persons as to the court may seem just<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 60. See *Bradley v Muntion* (1852) 16 Beav 294; *Ex p Davies* (1852) 16 Jur 882; *Ayles v Cox, ex p Attwood* (1853) 17 Beav 584; *Re Nash's Estate* (1855) 4 WR 111; *Re Thornton's Trusts* (1861) 9 WR 475; *Re Knox's Trusts* [1895] 2 Ch 483, CA; *Re Ruthven's Trusts* [1906] 1 IR 236, Ir CA. For the form of an order that the costs and expenses be a charge on the real property and be raised by mortgage thereof see 2 Seton's Judgments and Orders (7th Edn) 1179. As to the general entitlement of trustees to their costs out of the trust funds see CPR 48.4; and PARA 907 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(i) In general/874. Vesting order in case of person mentally disordered or lacking capacity.

**874. Vesting order in case of person mentally disordered or lacking capacity.**

The power to make vesting orders in relation to trust property where the power of appointing new trustees or of retiring from the trust is vested in a person suffering from mental disorder<sup>1</sup> or lacking capacity<sup>2</sup>, or in relation to the property of such a person, is discussed elsewhere in this work<sup>3</sup>.

1    Ie within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) PARA 402.

2    Ie within the meaning of the Mental Capacity Act 2005: see MENTAL HEALTH vol 30(2) (Reissue) PARA 641.

3    As to vesting and transfer orders in these circumstances see MENTAL HEALTH vol 30(2) (Reissue) PARA 723 et seq; and as to the effect of such orders see PARA 877 post.

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## (ii) Vesting Orders of Land

### A. ORDERS ON THE APPOINTMENT ETC OF TRUSTEES

#### 875. Vesting orders as to land.

The court<sup>1</sup> may make an order (a 'vesting order') vesting trust land<sup>2</sup> or any interest in such land in any such person and in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right<sup>3</sup> in such land to such person as the court may direct, in the following cases<sup>4</sup>:

- 155 (1) where the court appoints or has appointed a trustee or where a trustee has been appointed out of court under any statutory or express power<sup>5</sup>;
- 156 (2) where a trustee entitled to or possessed of any land or interest in land, whether by way of mortgage<sup>6</sup> or otherwise, or entitled to a contingent right in land, solely or jointly with any other person, either:
  - 9 11. (a) is under disability<sup>7</sup>; or
  12. (b) is out of the jurisdiction of the High Court<sup>8</sup>; or
  13. (c) cannot be found, or, being a corporation, has been dissolved<sup>9</sup>;
- 10 157 (3) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land<sup>10</sup>;
- 158 (4) where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead<sup>11</sup>;
- 159 (5) where there is no personal representative<sup>12</sup> of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain<sup>13</sup> who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land<sup>14</sup>;
- 160 (6) where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right in land, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey<sup>15</sup> the land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for 28 days after the date of the requirement<sup>16</sup>;
- 161 (7) where land or any interest in land is vested in a trustee, whether by way of mortgage or otherwise, and it appears to the court to be expedient<sup>17</sup>.

1 For the meaning of 'court' see PARA 632 note 3 ante. See also PARA 869 ante.

2 For the meaning of 'land' see PARA 605 note 5 ante.

3 For these purposes, 'contingent right' as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, and also a right of entry, whether immediate or future and whether vested or contingent: Trustee Act 1925 s 68(1) PARA (2).



4 See *ibid* s 44.

5 *Ibid* s 44(i). For the meaning of 'trustee' see PARA 601 ante.

6 For the meaning of 'mortgage' see PARA 867 note 2 ante.

7 Trustee Act 1925 s 44(ii)(a). A person incapable of managing his affairs is clearly under disability: *Re Harrison's Settlement Trusts, Morris v Harrison-Sleap*[1965] 3 All ER 795, [1965] 1 WLR 1492 (order vesting the assets in the remaining trustees without removing the incapable trustee refused). As to the power to make vesting orders in relation to such persons see MENTAL HEALTH vol 30(2) (Reissue) PARA 723 et seq. The appointment of a minor to be a trustee of any property is void: see PARA 609 ante.

8 Trustee Act 1925 s 44(ii)(b). See *Re Skitter's Mortgage Trust* (1856) 4 WR 791; *Hooper v Strutton* (1864) 12 WR 367; *Re O'Donnell's Trusts* (1871) 19 WR 522; *Re Keeley's Trusts* (1885) 53 LT 487.

9 Trustee Act 1925 s 44(ii)(c). As to a trustee who cannot be found see *Re Hulme's Trusts* (1887) 57 LT 13. As to a corporation which has been dissolved see *Re Strathlaine Estates Ltd*[1948] Ch 228, [1948] 1 All ER 162.

10 Trustee Act 1925 s 44(iii).

11 *Ibid* s 44(iv).

12 For the meaning of 'personal representative' see PARA 602 note 1 ante.

13 The uncertainty may arise from delay in probate owing to the will being disputed: *Re Cook's Mortgage*[1895] 1 Ch 700.

14 Trustee Act 1925 s 44(v). Where a rector died before the completion of the sale of his rectory and no successor was to be appointed, he was declared to have been a trustee at his death and a vesting order was made: *Re Peek's Contract* (1920) 65 Sol Jo 220.

15 For these purposes, 'convey' and 'conveyance' as applied to any person include the execution by that person of every necessary or suitable assurance (including an assent) for conveying, assigning, appointing, surrendering or otherwise transferring or disposing of land of which he is seised or possessed, or in which he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance: Trustee Act 1925 s 68(1) PARA (3).

16 *Ibid* s 44(vi). A mortgagor who has been foreclosed and has neglected or refused to convey the mortgaged property after being required to do so is a trustee within this provision, so that a vesting order may be made: *Jones v Davies* [1940] WN 174. See also *Rowley v Adams* (1851) 14 Beav 130; *Re Badcock's Trusts* (1854) 2 WR 386; *McMurray v Spicer*(1868) LR 5 Eq 527; *Re O'Donnell's Trusts* (1871) 19 WR 522; *Re Grayson's Trusts* (1879) 27 WR 534; *Re Keeley's Trusts* (1885) 53 LT 487; *Re Knox's Trusts*[1895] 2 Ch 483, CA (recusant trustee ordered to pay costs); *Re Ruthven's Trusts*[1906] 1 IR 236, Ir CA. The refusal of a trustee to convey is not wilful if there is doubt as to the title: *Re Mills' Trusts*(1888) 40 ChD 14, CA.

17 Trustee Act 1925 s 44(vii).

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### **876. Estate which vests under order.**

Where a vesting order<sup>1</sup> is consequential on the appointment of a trustee<sup>2</sup>, the land<sup>3</sup> or interest in land must be vested for such estate as the court<sup>4</sup> may direct in the persons who on the appointment are the trustees<sup>5</sup>. Where a vesting order relates to a trustee entitled or formerly entitled jointly with another person, and the trustee is under disability or out of the jurisdiction of the High Court or cannot be found, or, being a corporation, has been dissolved, the land, interest or right must be vested in such other person who remains entitled, either alone or with any other person the court may appoint<sup>6</sup>.

1 For the meaning of 'vesting order' see PARA 875 ante.

2 For the meaning of 'trustee' see PARA 601 ante.

3 For the meaning of 'land' see PARA 605 note 5 ante.

4 For the meaning of 'court' see PARA 632 note 3 ante.

5 Trustee Act 1925 s 44 proviso (a). See *Re Watt's Settlement* (1851) 9 Hare 106; *Re Plyer's Trust* (1851) 9 Hare 220; *Re Fisher's Will Trustees* (1853) 1 WR 505; *Smith v Smith* (1854) 3 Drew 72; *Re Marquis of Bute's Will* (1859) John 15; *Re Rathbone* (1876) 2 ChD 483, CA; *Re Pilling's Trusts* (1884) 26 ChD 432; *Re Rackstraw's Trusts* (1885) 52 LT 612; *Re Bishop of Sarum* [1886] WN 140; *Re William's Trusts* (1887) 36 ChD 231.

6 Trustee Act 1925 s 44 proviso (b). See *Re Templer's Trusts* (1864) 4 New Rep 494; *Re Greenwood's Trusts* (1884) 27 ChD 359.

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### **877. Effect of vesting order.**

Where it is consequential on the appointment of a trustee<sup>1</sup>, a vesting order<sup>2</sup> has the same effect as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land<sup>3</sup> for such estate or interest as the court<sup>4</sup> directs, or, if there is no such person or no such person of full capacity, then as if such a person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate or interest as the court directs<sup>5</sup>. In every other case a vesting order has the same effect as if the trustee or other person, or description or class of persons, to whose rights or supposed rights the statutory provisions as to vesting orders relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order<sup>6</sup>.

1 For the meaning of 'trustee' see PARA 601 ante.

2 For the meaning of 'vesting order' see PARA 875 ante.

3 For the meaning of 'conveyance' see PARA 875 note 15 ante. For the meaning of 'land' see PARA 605 note 5 ante.

4 For the meaning of 'court' see PARA 632 note 3 ante.

5 Trustee Act 1925 s 49. Cf the Law of Property Act 1925 s 9; and REAL PROPERTY vol 39(2) (Reissue) PARA 232. The effect may be to bar an estate tail: *Re Montagu, Faber v Montagu* [1896] 1 Ch 549; *Re Hambrough's Estate, Hambrough v Hambrough* [1909] 2 Ch 620. It has not been possible to create an entailed interest since 1 January 1997 (see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; para 605 note 7 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 105; SETTLEMENTS vol 42 (Reissue) PARA 677), but then existing entailed interests are unaffected.

6 Trustee Act 1925 s 49. See note 5 supra.

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## **878. Conclusive effect of orders made upon certain allegations.**

Where a vesting order is made<sup>1</sup> as to any land<sup>2</sup>, founded on an allegation of any of the following matters:

- 162 (1) the personal incapacity of a trustee<sup>3</sup>; or
- 163 (2) that a trustee or the personal representative<sup>4</sup> of or other person deriving title under a trustee is out of the jurisdiction of the High Court or cannot be found, or, being a corporation, has been dissolved<sup>5</sup>; or
- 164 (3) that it is uncertain which of two or more trustees was the survivor<sup>6</sup>; or
- 165 (4) that it is uncertain whether the last trustee, or the personal representative of or other person deriving title under a trustee, is living or dead<sup>7</sup>; or
- 166 (5) that any trustee has died intestate without leaving a person beneficially interested under the intestacy, or has died and it is not known who is his personal representative or the person interested<sup>8</sup>,

then the fact that the order has been so made is conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order<sup>9</sup>.

The court may, however, direct a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained<sup>10</sup>.

1   le under the Trustee Act 1925 or under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively repealed) or any corresponding provisions having effect in Northern Ireland: see the Trustee Act 1925 s 55 (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 4(d)). As from 1 October 2007, this provision is further amended so as to refer also to vesting orders made under the Mental Capacity Act 2005 ss 15-20: see the Trustee Act 1925 s 55 (as so amended; and further amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (5)(a)); the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. For the meaning of 'vesting order' for the purposes of the Trustee Act 1925 see PARA 875 ante. As to vesting orders see MENTAL HEALTH vol 30(2) (Reissue) PARA 723 et seq; and as to corresponding provisions having effect in Northern Ireland see MENTAL HEALTH vol 30(2) (Reissue) PARA 405.

2   For the meaning of 'land' see PARA 605 note 5 ante.

3   Trustee Act 1925 s 55(a). As from 1 October 2007, this provision is substituted so as to refer to the lack of capacity of a trustee in relation to the matter in question: see s 55(a) (substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 3(1), (5)(b)); the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. For the meaning of 'trustee' see PARA 601 ante.

4   For the meaning of 'personal representative' see PARA 602 note 1 ante.

5   Trustee Act 1925 s 55(b).

6   Ibid s 55(c).

7   Ibid s 55(d).

8   Ibid s 55(e).

9   Ibid s 55 (as amended: see note 1 supra). These provisions are also applicable where the allegation on which the vesting order was made related to a mortgagee: see s 55 (as so amended). As to vesting orders in the case of a mortgagee see PARAS 881-882 post; and MORTGAGE vol 77 (2010) PARAS 605, 625.

10 See *ibid* s 55 (as amended: see note 1 *supra*).

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### **879. Appointment of person to convey.**

In all cases where a vesting order<sup>1</sup> may be made, the court<sup>2</sup> may, if it is more convenient, appoint a person to convey the land<sup>3</sup> or any interest in land or release the contingent right<sup>4</sup>; and a conveyance or release by that person in conformity with the order has the same effect as a vesting order would have had<sup>5</sup>.

1 For the meaning of 'vesting order' see PARA 875 ante.

2 For the meaning of 'court' see PARA 632 note 3 ante.

3 For the meaning of 'convey' see PARA 875 note 15 ante. For the meaning of 'land' see PARA 605 note 5 ante.

4 For the meaning of 'contingent right' see PARA 875 note 3 ante.

5 Trustee Act 1925 s 50. See *Re Plyer's Trust* (1851) 9 Hare 220; *Hargreaves v Wright* (1853) 1 WR 408; *Wellesley v Wellesley*, *Mornington v Mornington*, *ex p Countess Mornington* (1853) 4 De GM & G 537, CA; *Wood v Beetlestone* (1854) 1 K & J 213; *Wilks v Groom* (1856) 6 De GM & G 205; *Hancox v Spittle* (1857) 3 Sm & G 478; *Re Willan* (1861) 9 WR 689; *Re Taylor* [1866] WN 5; *Derham v Kiernan* (1871) IR 5 Eq 217; *Grace v Baynton* [1877] WN 79; *Foster v Parker* (1878) 8 ChD 147; *Hall v Hale* (1884) 51 LT 226; *Moorhead v Kirkwood* [1919] 1 IR 225 (where it was held that the application was to be made by the person having the conduct of the proceedings and not by the purchaser); *Hipkin v Hipkin* [1962] 2 All ER 155, [1962] 1 WLR 491 (appointment of sequestrator to convey contemnor's land). As to the jurisdiction of county courts see PARA 641 ante; and as to trustees lacking mental capacity see *Herring v Clark* (1868) 4 Ch App 167; *Re Mason* (1875) 10 Ch App 273; *Re Vicat* (1886) 33 ChD 103, CA (where a continuing trustee was appointed); *Re Jones, Zincraft's Will Trusts* (1886) 33 ChD 414; *Re Nicholson* (1887) 34 ChD 663, CA; *Cowper v Harmer* (1887) 57 LT 714 (where it was held that a covenant for quiet enjoyment by a person lacking mental capacity could not be inserted in a lease); *Re JJD* [1928] IR 538.

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## ***B. OTHER VESTING ORDERS OF LAND***

### **880. Orders as to contingent rights of unborn persons.**

Where any interest in land<sup>1</sup> is subject to a contingent right<sup>2</sup> in an unborn person or class of unborn persons who, on coming into existence, would in respect thereof become entitled to or possessed of that interest on any trust<sup>3</sup>, the court<sup>4</sup> may make an order releasing the land or interest from the contingent right, or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land<sup>5</sup>.

1 For the meaning of 'land' see PARA 605 note 5 ante.

2 For the meaning of 'contingent right' see PARA 875 note 3 ante.

3 For the meaning of 'trust' see PARA 601 ante.

4 For the meaning of 'court' see PARA 632 note 3 ante.

5 Trustee Act 1925 s 45.

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**881. Vesting order in place of conveyance by mortgagee who is a minor.**

Where any person entitled to or possessed of any interest in land<sup>1</sup> or entitled to a contingent right<sup>2</sup> in land by way of security for money is a minor, the court<sup>3</sup> may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability<sup>4</sup>.

1 For the meaning of 'land' see PARA 605 note 5 ante.

2 For the meaning of 'contingent right' see PARA 875 note 3 ante.

3 For the meaning of 'court' see PARA 632 note 3 ante.

4 Trustee Act 1925 s 46. As to the making of vesting or other orders in the case of a trustee under disability see PARA 875 ante.



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## **882. Vesting where sale or mortgage ordered by the court.**

Where a court<sup>1</sup> gives a judgment or makes an order directing the sale<sup>2</sup> or mortgage<sup>3</sup> of any land<sup>4</sup>, every person who is entitled to or possessed of any interest in the land or entitled to a contingent right<sup>5</sup> in it, and is a party to the claim or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, is deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of the Trustee Act 1925<sup>6</sup>; and the court may, if it thinks it expedient, make an order vesting the land or any part of it, for such estate or interest as that court thinks fit, in the purchaser or mortgagee<sup>7</sup> or in any other person<sup>8</sup>.

1 For the meaning of 'court' see PARA 632 note 3 ante.

2 For these purposes, 'sale' includes an exchange: Trustee Act 1925 s 68(1) PARA (3).

3 For the meaning of 'mortgage' see PARA 867 note 2 ante.

4 For the meaning of 'land' see PARA 605 note 5 ante. As to the court's power to order a sale or mortgage of land see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 727; SALE OF LAND vol 42 (Reissue) PARA 133 et seq.

5 For the meaning of 'contingent right' see PARA 875 note 3 ante.

6 Trustee Act 1925 s 47.

7 For these purposes, 'mortgagee' includes a chargee by way of legal mortgage and every person deriving title under the original mortgagee: *ibid* s 68(1) PARA (7).

8 *Ibid* s 47. In the case of a legal mortgage the estate to be vested in the mortgagee is a term of years absolute: s 47 proviso.

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### **883. Vesting where specific performance or conveyance is ordered.**

Where a judgment is given for the specific performance<sup>1</sup> of a contract concerning any interest in land<sup>2</sup> or for sale<sup>3</sup> or exchange of any interest in land, or generally where any judgment is given for the conveyance<sup>4</sup> of any interest in land, either in cases arising out of the doctrine of election<sup>5</sup> or otherwise, the court<sup>6</sup> may declare that:

- 167 (1) any of the parties to the claim are trustees of any interest in the land or any part of it within the meaning of the Trustee Act 1925<sup>7</sup>; or
- 168 (2) the interests of unborn persons who might claim under any party to the claim, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of that Act<sup>8</sup>.

The court may then make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees<sup>9</sup>.

1 As to specific performance see SPECIFIC PERFORMANCE.

2 For the meaning of 'land' see PARA 605 note 5 ante.

3 For the meaning of 'sale' see PARA 882 note 2 ante.

4 For the meaning of 'conveyance' see PARA 875 note 15 ante.

5 As to the doctrine of election see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

6 For the meaning of 'court' see PARA 632 note 3 ante.

7 Trustee Act 1925 s 48(a). For the meaning of 'trustee' see PARA 601 ante.

8 Ibid s 48(b).

9 Ibid s 48. See *Caswell v Sheen* (1893) 69 LT 854; *Re Montagu, Faber v Montagu* [1896] 1 Ch 549. See also *Mellor v Porter* (1883) 25 ChD 158.

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### (iii) Vesting Orders as to Stock and Things in Action

#### 884. Power to make orders.

The court<sup>1</sup> may make an order vesting the right to transfer or call for a transfer of stock<sup>2</sup>, or to receive the dividends or income of such stock, or to sue for or recover a thing in action, in any such person as the court may appoint, in the following cases<sup>3</sup>:

- 169 (1) where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power<sup>4</sup>;
- 170 (2) where a trustee entitled, whether by way of mortgage<sup>5</sup> or otherwise, alone or jointly with another person to stock or to a thing in action:
  - 11
  - 14. (a) is under disability<sup>6</sup>; or
  - 15. (b) is out of the jurisdiction of the High Court<sup>7</sup>; or
  - 16. (c) cannot be found, or, being a corporation, has been dissolved<sup>8</sup>; or
  - 17. (d) neglects or refuses to transfer stock or receive the dividends or income of such stock, or to sue for or recover a thing in action, according to the direction of the person absolutely entitled to it, for 28 days next after a request in writing has been made to him by the person so entitled<sup>9</sup>; or
  - 18. (e) neglects or refuses to transfer stock or receive the dividends or income of it, or to sue for or recover a thing in action, for 28 days next after an order of the court for that purpose has been served on him<sup>10</sup>;
  - 12
- 171 (3) where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a thing in action is alive or dead<sup>11</sup>;
- 172 (4) where stock is standing in the name of a deceased person whose personal representative is under disability<sup>12</sup>;
- 173 (5) where stock or a thing in action is vested in a trustee, whether by way of mortgage or otherwise, and it appears to the court to be expedient<sup>13</sup>.

1 For the meaning of 'court' see PARA 632 note 3 ante.

2 For these purposes, 'stock' includes fully paid up shares, and, so far as relates to vesting orders made by the court under the Trustee Act 1925, includes any fund, annuity or security transferable in books kept by any company or society or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein: s 68(1) PARA (14). See *Re New Zealand Trust and Loan Co*[1893] 1 Ch 403, CA. The provisions of the Trustee Act 1925 as to vesting orders apply to shares in ships registered under the Merchant Shipping Act 1995 as if they were stock: Trustee Act 1925 s 51(6) (amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 13). 'Transfer', in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act and thing on the part of the transferor to effect and complete the title in the transferee: Trustee Act 1925 s 68(1) PARA (16).

A vesting order can only be made in respect of stocks and shares situated within the territorial jurisdiction of the court. However, the court has jurisdiction to make an order in personam directing a person within its jurisdiction to carry out his fiduciary duties arising under a trust notwithstanding that the order relates to property abroad: *Chellaram v Chellaram*[1985] Ch 409, [1985] 1 All ER 1043; *Webb v Webb*[1992] 1 All ER 17, [1991] 1 WLR 1410 (further proceedings [1994] QB 696, [1994] 3 All ER 911, ECJ); *Ashurst v Pollard*[2000] 2 All ER 772.

3 See the Trustee Act 1925 s 51(1). As to things in action see CHOSER IN ACTION vol 13 (2009) PARA 1 et seq.

4 Ibid s 51(1)(i). For the meaning of 'trustee' see PARA 601 ante.

5 For the meaning of 'mortgage' see PARA 867 note 2 ante.

6 Trustee Act 1925 s 51(1)(ii)(a). As to minors see *Devoy v Devoy* (1857) 3 Sm & G 403; *Stone v Stone* (1857) 3 Jur NS 708; *Sanders v Homer* (1858) 25 Beav 467; *Rives v Rives* [1866] WN 144; *Gardner v Cowles* (1876) 3 ChD 304; *Re Harwood (infants)* (1882) 20 ChD 536; *Re Findlay (an infant)* (1886) 32 ChD 221; *Re Barnett's Estate, Foster v Barnett* [1889] WN 216; *Re Dehaynin (infants)* [1910] 1 Ch 223, CA. As to the making of vesting and transfer orders see also MENTAL HEALTH vol 30(2) (Reissue) PARA 723 et seq.

7 Trustee Act 1925 s 51(1)(ii)(b).

8 Ibid s 51(1)(ii)(c). As to a corporation having been dissolved see *Orwin v A-G* [1998] 2 BCLC 693, [1998] FSR 415, CA.

9 Trustee Act 1925 s 51(1)(ii)(d). See *Re Knox's Trusts* [1895] 2 Ch 483, CA. The refusing trustee may be ordered to pay the costs of the application: *Re Knox's Trusts* supra. The application cannot be made until the 28 days have expired: *Re Knox's Trusts* [1895] 1 Ch 538. The posting of a request to the trustee is prima facie evidence of its delivery to him: *Re Struve's Trusts* [1912] WN 149.

10 Trustee Act 1925 s 51(1)(ii)(e).

11 Ibid s 51(1)(iii). See *Re New Zealand Trust and Loan Co* [1893] 1 Ch 403, CA.

12 Trustee Act 1925 s 51(1)(iv).

13 Ibid s 51(1)(v). Although the President of the Family Division was not by virtue of the Administration of Estates Act 1925 s 9 (as originally enacted) a trustee for this purpose (see *Re Deans, Westminster Bank Ltd v Official Solicitor* [1954] 1 All ER 496, [1954] 1 WLR 332), it is not clear whether the position is the same under the Administration of Estates Act 1925 s 9 (as substituted) whereby on an intestacy or a lack of executors a person's real and personal estate will vest in the Public Trustee. See further PARA 731 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34. As to the Public Trustee see PARA 766 et seq ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(iii) Vesting Orders as to Stock and Things in Action/885. Terms of order.

### **885. Terms of order.**

Where the order as to stock or a thing in action<sup>1</sup> is consequential on the appointment of a trustee, the right is to be vested in the persons who, on the appointment, are the trustees<sup>2</sup>; and, where the person whose right is dealt with by the order was entitled jointly with another person, the right is to be vested in that other person either alone or jointly with any additional person whom the court may appoint<sup>3</sup>.

1     I.e. an order under the Trustee Act 1925 s 51 (as amended): see PARA 884 ante. For the meaning of 'stock' see PARA 884 note 2 ante. As to things in action see CHANCES IN ACTION vol 13 (2009) PARA 1 et seq.

2     Ibid s 51(1) proviso (a). For the meaning of 'trustee' see PARA 601 ante.

3     Ibid s 51(1) proviso (b). For the meaning of 'court' see PARA 632 note 3 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(iii) Vesting Orders as to Stock and Things in Action/886. Appointment of person to transfer.

### **886. Appointment of person to transfer.**

In all cases where a vesting order as to stock and things in action may be made<sup>1</sup>, the court<sup>2</sup> may, if it is more convenient, appoint some proper person to make or join in making the transfer<sup>3</sup>.

1     I.e. under the Trustee Act 1925 s 51 (as amended): see PARAS 884-885 ante. For the meaning of 'stock' see PARA 884 note 2 ante. As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

2     For the meaning of 'court' see PARA 632 note 3 ante.

2     Trustee Act 1925 s 51(2). The person to be appointed to make or join in making a transfer of stock must be some proper officer of the bank, company or society whose stock is to be transferred: s 51(2) proviso. For the meaning of 'transfer' see PARA 884 note 2 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(iii) Vesting Orders as to Stock and Things in Action/887. Exercise of right to transfer.

### **887. Exercise of right to transfer.**

The person in whom the right to transfer or call for the transfer of stock<sup>1</sup> is vested by an order of the court<sup>2</sup> may transfer the stock to himself or any other person, according to the order<sup>3</sup>. The court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of the Trustee Act 1925 is to be exercised<sup>4</sup>.

1 For the meaning of 'stock' see PARA 884 note 2 ante. For the meaning of 'transfer' see PARA 884 note 2 ante.

2 I.e. under the Trustee Act 1925 s 51 (as amended): see PARAS 884-885 ante. For the meaning of 'court' see PARA 632 note 3 ante.

3 Ibid s 51(3). See *Re Gregson* [1893] 3 Ch 233, CA; *Re CMG* [1898] 2 Ch 324, CA.

4 Trustee Act 1925 s 51(5). As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(3) VESTING ORDERS/(iii) Vesting Orders as to Stock and Things in Action/888. Effect of order.

### **888. Effect of order.**

The Registrar of Government Stock and any company must obey every vesting order as to stock and things in action<sup>1</sup> according to its tenor<sup>2</sup>; and after notice in writing of such an order may not transfer any stock to which it relates or pay any dividends on it except in accordance with the order<sup>3</sup>.

1 The orders made under the Trustee Act 1925 s 51 (as amended): see PARAS 884-885 ante. For the meaning of 'stock' see PARA 884 note 2 ante. As to things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq. As to the Registrar of Government Stock see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1336.

2 See *ibid* s 51(3) (amended by the Government Stock (Consequential and Transitional Provision) (No 2) Order 2004, SI 2004/1662, art 2, Schedule Pt 2 para 10(1), (2)(a)).

3 Trustee Act 1925 s 51(4) (amended by the Government Stock (Consequential and Transitional Provision) (No 2) Order 2004, SI 2004/1662, art 2, Schedule Pt 2 para 10(1), (2)(b)). See *Re Gregson* [1893] 3 Ch 233 at 237, CA, per Lindley LJ; *Re CMG* [1898] 2 Ch 324, CA.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/889. Death of trustee.

#### **(4) VACATION OF OFFICE**

##### **(i) Death and Retirement**

##### **889. Death of trustee.**

Although a person ceases to be a trustee on his death<sup>1</sup>, his estate may remain subject to liabilities incurred during his trusteeship<sup>2</sup>.

<sup>1</sup> As to the devolution of the trust property see PARA 732 ante; and as to the devolution of the trusts and powers see PARA 981 post.

<sup>2</sup> As to breach of trust see PARA 1084 et seq post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/890. Trustee's right to retire.

## **890. Trustee's right to retire.**

A person cannot be compelled to remain a trustee and act in the execution of a trust<sup>1</sup>; but according to the older authorities a trustee who has accepted a trust cannot from mere caprice or other trivial cause, or owing to some act or circumstances affecting himself personally, abandon the trust at the expense of the beneficiaries<sup>2</sup>. He has, however, always been able to insist on being discharged at the expense of the trust property if he has served for a long time and is of advanced age and in failing health<sup>3</sup>, or if much litigation has taken place<sup>4</sup>, or other difficult circumstances have arisen in connection with the trust which did not exist and were not contemplated when he undertook the office<sup>5</sup>. In such cases, if he cannot otherwise obtain his discharge, he may apply for it to a court of competent jurisdiction in proceedings to administer the trust<sup>6</sup>. He is not bound to show that there is some other person ready to accept the trust<sup>7</sup>. If no person is willing to accept the trust, it may be necessary to postpone the discharge of the trustee and keep him before the court; but, if this is done, the court takes care that he does not suffer thereby<sup>8</sup>. Since, however, by statute a trustee now has the right to retire if he desires to do so<sup>9</sup>, it would seem that a trustee should normally be allowed the costs of an application to the court if for any reason he is unable to take advantage of the statutory provisions.

1 *Forshaw v Higginson* (1855) 20 Beav 485 at 487 per Romilly MR.

2 *Howard v Rhodes* (1837) 1 Keen 581; *Courtenay v Courtenay* (1846) 3 Jo & Lat 519 at 529 per Sugden LC; *Forshaw v Higginson* (1855) 20 Beav 485 at 486 et seq.

3 *Gardiner v Downes* (1856) 22 Beav 395.

4 *Barker v Peile* (1865) 2 Drew & Sm 340.

5 *Coventry v Coventry* (1837) 1 Keen 758 (where the tenant for life had charged the trust property with annuities and other incumbrances); *Greenwood v Wakeford* (1839) 1 Beav 576 at 581-582 per Lord Langdale MR; *Forshaw v Higginson* (1855) 20 Beav 485; *Gardiner v Downes* (1856) 22 Beav 395 at 397 per Romilly MR.

6 *Forshaw v Higginson* (1855) 20 Beav 485 at 487 (where the persons having the power of appointing a new trustee refused to exercise it); *Re Chetwynd's Settlement, Scarisbrick v Nevins* [1902] 1 Ch 692; *Re Stretton, Stretton v Clegg* [1942] WN 95. Where administration is not asked for, the court cannot under the Trustee Act 1925 s 41(1) (as amended) (see PARA 849 et seq ante) discharge a trustee without appointing a new trustee in his place: *Re Aston* (1883) 23 ChD 217, CA; *Re Chetwynd's Settlement, Scarisbrick v Nevins* supra at 693 per Farwell J.

7 *Courtenay v Courtenay* (1846) 3 Jo & Lat 519 at 533 per Sugden LC.

8 *Courtenay v Courtenay* (1846) 3 Jo & Lat 519 at 533. See also *Re Chetwynd's Settlement, Scarisbrick v Nevins* [1902] 1 Ch 692 at 694 per Farwell J.

9 See the Trustee Act 1925 ss 36(1), 39(1) (as amended); and PARAS 836 ante, 891 post. See also *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61 at 81, [1981] 3 All ER 220 at 231, CA, per Brightman LJ.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/891. Method of retirement.

### 891. Method of retirement.

Except so far as authorised by statute<sup>1</sup> or by the instrument, if any, creating the trust, a trustee may only retire during the continuance of a trust by the valid appointment of another trustee in his place<sup>2</sup>.

By statute, where a trustee desires to be discharged from the trust, and after his discharge there will be either a trust corporation<sup>3</sup> or at least two persons to act as trustees to perform the trust, then, if he by deed declares that he is desirous of being discharged from the trust and if his co-trustees and such other person, if any, as is empowered to appoint trustees of the trust consent by deed to his discharge and to the vesting of the trust property in the co-trustees alone, he is deemed to have retired from the trust, and is, by the deed, discharged from it without any new trustee being appointed in his place<sup>4</sup>.

1 See the Trustee Act 1925 s 39 (as amended); and the text and notes 3-4 *infra*. As to retirement at the instance of the beneficiaries see PARA 897 *post*.

2 -- *v Osborne* (1801) 6 Ves 455; *Wilkinson v Parry* (1828) 4 Russ 272 at 276; *Adams v Paynter* (1844) 1 Coll 530 at 534; *Courtenay v Courtenay* (1846) 3 Jo & Lat 519 at 533; *Forshaw v Higginson* (1855) 20 Beav 485 at 487. If a trustee of a trust fund pays it into court, he thereby so far retires from the trust that a new trustee can be appointed in his place under a power to appoint a new trustee in the place of one refusing or declining to act: *Re Williams' Settlement* (1858) 4 K & J 87. If a new trustee has not been effectually appointed, the retiring trustee remains liable: *Pearce v Pearce* (1856) 22 Beav 248. As to power in a trust disposition to appoint a trustee in the place of one who desires to be discharged see PARA 823 *ante*; and as to such power under the Trustee Act 1925 s 36 (as amended) see PARA 836 *ante*.

3 For the meaning of 'trust corporation' see PARA 798 *ante*.

4 See the Trustee Act 1925 s 39(1) (amended with savings for transactions taking effect on or after 1 January 1997 by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(13)). A purported retirement is invalid and the retiring trustee is not discharged where he leaves a sole trustee, not being a trust corporation, to act as trustee following his retirement: *Adam & Co International Trustees Ltd v Theodore Goddard (a firm)* [2000] WTLR 349, 2 ITELR 634. Previously, the statute referred to 'individuals' not 'persons': see *Jasmine Trustees Ltd v Wells and Hind* [2007] EWHC 38 (Ch), [2007] 1 All ER 1142; and PARA 840 note 3 *ante*. Any assurance or thing requisite for vesting the trust property in the continuing trustees alone must be executed or done: see the Trustee Act 1925 s 39(2). These powers apply if and so far only as a contrary intention is not expressed by the instrument, if any, creating the trust: see s 69(2); and PARA 603 *ante*.

As to the retirement of a trustee where the Public Trustee or other trust corporation is or becomes a trustee see PARA 770 *ante*.

The trustees of a trade union and an unincorporated employers' association may retire more informally: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 13, 129(1)(b); and EMPLOYMENT vol 40 (2009) PARAS 875, 1035.

As to the position where a trustee is a patient under the Mental Health Act 1983 see s 96(1)(k) (prospectively repealed); and as to the position where a patient lacks capacity to make a decision in relation to retirement as a trustee under the Mental Capacity Act 2005 see s 16. See also MENTAL HEALTH vol 30(2) (Reissue) PARA 757.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/892. Costs, rights and duties of retiring trustee.

## **892. Costs, rights and duties of retiring trustee.**

Where a trustee is justified in retiring, he is not liable to pay any costs occasioned by his retirement, but whether he is entitled to his own costs in the matter depends on the circumstances of the case<sup>1</sup>. A trustee on retiring, and the representative of a deceased trustee on transferring the trust property to a new trustee, has a right to an examined copy of the deed appointing the new trustee, but not to a duplicate of it or to an attested copy of the instrument creating the trust<sup>2</sup>.

A retiring trustee can be required to produce to his successor documents relating to the administration of the trust<sup>3</sup>.

1 *A-G v Murdoch* (1856) 2 K & J 571 at 573 per Wood V-C. As to the general rule that a trustee is not to be deprived of his costs of proceedings unless he has acted for a benefit other than that of the trust fund see PARA 907 post.

2 *Warter v Anderson* (1853) 11 Hare 301. As to the right of a trustee to a release see PARA 925 post.

3 *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85, CA. A corporate trustee may be required to produce internal memoranda and correspondence passing between its various officials and departments: *Tiger v Barclays Bank Ltd* supra.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/893. Corrupt retirement.

### **893. Corrupt retirement.**

Where a trustee retires in favour of another person in consideration of a sum of money paid to him by that person, the court will declare the deed containing the appointment of that person as trustee to be void, so that the trust and the trust property will remain in the trustees in whom they were vested before it was executed<sup>1</sup>. The purportedly retiring trustee will be liable to account to the beneficiaries for the amount of the bribe he received<sup>2</sup> and may well be treated as a constructive trustee of it for them<sup>3</sup>.

1 *Sugden v Crossland* (1856) 3 Sm & G 192.

2 Cf *Lister & Co v Stubbs* (1890) 45 ChD 1, CA; and see PARA 697 ante.

3 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC; and see PARA 697 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/894. Retirement in contemplation of breach of trust.

#### **894. Retirement in contemplation of breach of trust.**

A trustee who retires in favour of a new trustee, with the knowledge or suspicion that a breach of trust is intended to be committed after his retirement, is liable for any loss occasioned by the breach of trust<sup>1</sup>. If one of two trustees who feels no confidence in his co-trustee retires in favour of a new trustee appointed by that co-trustee, he renders himself liable to grave risk in the event of any subsequent misconduct on the part of the continuing trustee and the new trustee<sup>2</sup>.

1 *Webster v Le Hunt, Le Hunt v Webster* (1861) 9 WR 918; *Palaiet v Carew* (1863) 32 Beav 564 at 567-568 per Romilly MR; *Clark v Hoskins* (1868) 37 LJ Ch 561 at 566, CA; *Head v Gould* [1898] 2 Ch 250. He will not, however, be liable for an entirely different breach of trust from that which was contemplated when he retired: *Clark v Hoskins* supra at 567. As to liability for acts of co-trustees see PARA 952 post.

2 *Forshaw v Higginson* (1855) 20 Beav 485 at 487 per Romilly MR.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/895. Effect of retirement.

### **895. Effect of retirement.**

The retirement of a trustee does not terminate his liabilities as a shareholder, or in any other capacity in which he has incurred liability to third persons, until he has taken the proper steps for getting rid of those liabilities by transferring the shares out of his name or otherwise<sup>1</sup>.

<sup>1</sup> *Re City of Glasgow Bank, Mitchell's Case* (1879) 4 App Cas 547 at 567, 572, 576, HL.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/896. Resumption of trust.

### **896. Resumption of trust.**

A trustee who has validly retired from the trust cannot after the lapse of several years resume his position as trustee without being formally reappointed, notwithstanding that the appointment of his successor was not formally effected<sup>1</sup>.

<sup>1</sup> *Lancashire v Lancashire* (1848) 2 Ph 657.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(i) Death and Retirement/897. Retirement under the Trusts of Land and Appointment of Trustees Act 1996.

## **897. Retirement under the Trusts of Land and Appointment of Trustees Act 1996.**

Where there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and the beneficiaries<sup>1</sup> under the trust are of full age and capacity and, taken together, are absolutely entitled to the property subject to the trust, they may give a written direction to a trustee or trustees to retire from the trust<sup>2</sup>.

Where:

- 174 (1) a trustee has been given such a direction<sup>3</sup>;
- 175 (2) reasonable arrangements have been made for the protection of any rights of his in connection with the trust<sup>4</sup>;
- 176 (3) after he has retired there will be either a trust corporation or at least two persons to act as trustees to perform the trust<sup>5</sup>; and
- 177 (4) either another person is to be appointed to be a new trustee on his retirement<sup>6</sup> or the continuing trustees by deed consent to his retirement<sup>7</sup>,

he must make a deed declaring his retirement and is deemed to have retired and be discharged from the trust<sup>8</sup>.

Where a trustee retires under these provisions<sup>9</sup>, he and the continuing trustees together with any new trustee must, subject to any arrangement for the protection of his rights, do anything necessary to vest the trust property in the continuing trustees, or the continuing and new trustees<sup>10</sup>.

1 For the meaning of 'beneficiary' see PARA 739 note 1 ante.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 19(1), (2)(a). They may also give a written direction to the trustees or trustee for the time being to appoint the person or persons specified in the direction to be a trustee or trustees: see s 19(2)(b); and PARA 845 ante.

For these purposes, a direction is given by beneficiaries if a single direction is jointly given by all of them or a direction is given by each of them (whether solely or jointly with one or more, but not all, of the others), and none of them by writing withdraws the direction given by him before it has been complied with: s 21(1). Where more than one direction is given each must specify for retirement the same person or persons: s 21(2).

The provisions of s 19 do not apply in relation to a trust created by a disposition in so far as provision that they do not apply is made by the disposition (s 21(5)); nor do they apply in relation to a trust created before 1 January 1997 by a disposition in so far as provision to the effect that they do not apply is made by a deed executed by the person or persons who created the trust (see s 21(6), (7), (8); and PARA 847 ante). As to trusts in relation to which beneficiaries cannot make a direction see further PARA 847 ante.

3 Ibid s 19(3)(a).

4 Ibid s 19(3)(b).

5 Ibid s 19(3)(c).

6 Ie whether in compliance with a direction under ibid s 19(2)(b) (see note 2 supra; and PARA 845 ante) or otherwise.

7 Ibid s 19(3)(d).

8 Ibid s 19(3).

9 le ibid s 19(3).

10 Ibid s 19(4).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(ii) Removal/898. Removal by appointment of new trustee.

## **(ii) Removal**

### **898. Removal by appointment of new trustee.**

A trustee can be removed from the trust by the appointment of a new trustee in his place in any circumstances in which the power, if any, in the instrument creating the trust<sup>1</sup>, or the statutory powers<sup>2</sup>, authorise such an appointment.

1 As to the appointment of new trustees under the power in the trust disposition see PARA 819 et seq ante.

2 See the Trustee Act 1925 s 36 (as amended); and PARA 835 et seq ante. See also the Trusts of Land and Appointment of Trustees Act s 20 (as amended); and PARAS 846 et seq ante, 899 post. As to the removal of trustees of charitable trusts see CHARITIES; and as to the removal of trustees of friendly societies see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2179.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(ii) Removal/899. Removal by direction of the beneficiaries.

### **899. Removal by direction of the beneficiaries.**

A trustee can be removed from the trust by direction of the beneficiaries in the limited circumstances prescribed by statute, either by the appointment of a new trustee in his place<sup>1</sup> or without replacement<sup>2</sup>.

<sup>1</sup> See the Trusts of Land and Appointment of Trustees Act 1996 s 20 (as amended; prospectively amended); and PARA 846 et seq ante.

<sup>2</sup> See *ibid* s 19; and PARA 897 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(ii) Removal/900. Removal by the court.

## 900. Removal by the court.

The court<sup>1</sup> will remove a trustee, including the trustee of a foreign settlement<sup>2</sup>, where he refuses to execute the trust<sup>3</sup>, or has mismanaged the trust<sup>4</sup> or has disqualified himself by his circumstances or conduct from continuing to hold the office<sup>5</sup>, and may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with its objects<sup>6</sup> or with the beneficiaries<sup>7</sup>. A trustee will not, however, be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interests of the beneficiaries<sup>8</sup>. When a trustee is removed, he is usually ordered to pay the costs of his removal<sup>9</sup>.

1 In the High Court the proper division to which to apply to remove trustees is the Chancery Division: see PARA 632 ante. What is now the Family Division has declined to order the removal of a trustee on an application for a variation of a post-nuptial settlement under what is now the Matrimonial Causes Act 1973 s 24 (prospectively substituted) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq): *Compton (Marquess of Northampton) v Compton (Marchioness of Northampton) and Hussey* [1960] P 201 at 211, [1960] 2 All ER 70 at 76. See PARA 667 note 7 ante. The removal of a trustee can often involve a serious reflection on character: *Compton (Marquess of Northampton) v Compton (Marchioness of Northampton) and Hussey* supra at 211 and 76. As to the courts which have jurisdiction in relation to trusts see PARA 632 et seq ante.

2 *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043.

3 *Palairot v Carew* (1863) 32 Beav 564; *Luke v South Kensington Hotel Co* (1879) 11 ChD 121 at 127, CA, per Jessell MR.

4 *Ex p Phelps* (1742) 9 Mod Rep 357; *Ex p Reynolds* (1800) 5 Ves 707; *Peatfield v Benn* (1853) 17 Beav 522.

5 *Millard v Eyre* (1793) 2 Ves 94; *Re Ledwich* (1844) 6 I Eq R 561; *Passingham v Sherborn* (1846) 9 Beav 424 at 427 et seq; *Charitable Donations Comrs v Archbold* (1847) 11 I Eq R 187; *O'Reilly v Alderson* (1849) 8 Hare 101; *A-G v Murdoch* (1852) 1 De GM & G 86 (on further directions (1856) 2 K & J 571); *Moore v M'Glynn* [1894] 1 IR 74; *Clarke v Heathfield (No 2)* [1985] ICR 606. The court, on application, has removed a trustee who has committed a criminal offence (*Re Danson* (1899) 48 WR 73), or a trustee who has become bankrupt, where in administering the trust he has to receive or deal with trust money so that he has the opportunity of misappropriating it (*Re Barker's Trusts* (1875) 1 ChD 43; *Re Adams' Trust* (1879) 12 ChD 634), or where, besides the bankruptcy, he has acted in a manner prejudicial to the trust (*Re Betts, Maclean v Betts* (1897) 41 Sol Jo 209; affd by the Court of Appeal (unreported, but cited in *Re Danson* supra)). The court may remove a trustee who made an improper threat to deprive the claimants of their interest in the trust property: *Rubin v Rubin* [2001] All ER (D) 59 (Nov). Friction or hostility between a trustee and the person who has the present beneficial interest in the trust property is not of itself a reason for the removal of the trustee, but it is taken into account, where it is grounded on the mode in which the trust has been administered, or where it has arisen wholly or partially out of substantial overcharges by the trustee against the trust property: *Letterstedt v Broers* (1884) 9 App Cas 371 at 389, PC. For a discussion of the general principles guiding the court in the exercise of its inherent jurisdiction to remove trustees see *Isaac v Isaac* [2005] EWHC 435 (Ch) at [65]-[72], [2005] All ER (D) 379 (Mar) at [65]-[72] per Parkes J. Conflict of interest is not necessarily grounds for removal of a trustee: *Isaac v Isaac* supra. The fact that the person appointed has acted as solicitor to the trustee making the appointment is not a sufficient ground for the removal of the appointee by the court: *Re Cotter, Jennings v Nye* [1915] 1 Ch 307. As to the power to remove a trustee against his will see also PARA 901 post.

6 *A-G v Hardy* (1851) 1 Sim NS 338 at 357 per Lord Cranworth V-C. See, however, *A-G v Clapham* (1855) 4 De GM & G 591 at 632 per Lord Cranworth LC; *Letterstedt v Broers* (1884) 9 App Cas 371 at 386-387, PC.

7 *A-G v Hardy* (1851) 1 Sim NS 338 at 357 per Lord Cranworth V-C. See, however, *A-G v Clapham* (1855) 4 De GM & G 591 at 632 per Lord Cranworth V-C; *Letterstedt v Broers* (1884) 9 App Cas 371 at 386-387, PC.

8 *Re Bridgman* (1860) 8 WR 598; *Assets Realisation Co v Trustees, Executors and Securities Insurance Corp'n* (1895) 65 LJ Ch 74.

9     *A-G v Murdoch* (1856) 2 K & J 571 at 573 per Wood V-C; *Palairot v Carew* (1863) 32 Beav 564.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(4) VACATION OF OFFICE/(ii) Removal/901. Procedure for removal of trustee against his will.

### **901. Procedure for removal of trustee against his will.**

Where there is no dispute of fact, the court<sup>1</sup>, in exercise of its statutory power to appoint new trustees<sup>2</sup>, may order the removal of a trustee against his will in a claim made under the Part 8 procedure<sup>3</sup>. Where there is a dispute of fact, the proper course is to invoke the court's inherent jurisdiction over trustees in a claim for the administration or execution of the trusts made under the standard procedure<sup>4</sup>.

1 See PARA 900 note 1 ante.

2 See PARA 849 et seq ante.

3 See *Re Henderson, Henderson v Henderson* [1940] Ch 764, [1940] 3 All ER 295; *Re A Solicitor* [1952] Ch 328, [1952] 1 All ER 133 (bankrupt solicitor removed from the trusteeship of the clients' account). As to the Part 8 procedure see CPR Pt 8; and CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq. In proceedings under the Trustee Act 1925, the court cannot inquire as to the alleged incapacity of a trustee by reason of mental incapacity where it is denied by him: *Re Combs* (1884) 51 LT 45.

4 See *Re Chetwynd's Settlement, Scarisbrick v Nevinson* [1902] 1 Ch 692; *Re Henderson, Henderson v Henderson* [1940] Ch 764 at 767, [1940] 3 All ER 295 at 298. See also *Re Wrightson, Wrightson v Cooke* [1908] 1 Ch 789. As to the standard procedure see CPR Pt 7; and CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/A. IN GENERAL/902. Reimbursement and indemnity under the Trustee Act 2000 in respect of expenses and liabilities.

## **(5) RIGHTS OF TRUSTEES**

### **(i) Reimbursement and Indemnity**

#### **A. IN GENERAL**

#### **902. Reimbursement and indemnity under the Trustee Act 2000 in respect of expenses and liabilities.**

A trustee is entitled to be reimbursed from the trust funds<sup>1</sup>, or may pay out of the trust funds, expenses properly<sup>2</sup> incurred by him when acting on behalf of the trust<sup>3</sup>. This provision applies to a trustee who has been duly authorised<sup>4</sup> to exercise functions as an agent of the trustees or to act as a nominee or custodian, as it applies to any other trustee<sup>5</sup>. Further, at least where there is a simple trust, the beneficiary or beneficiaries are under an obligation to indemnify the trustees<sup>6</sup>.

1 'Trust funds' means income or capital funds of the trust: Trustee Act 2000 s 39(1).

2 The corresponding provision in the Trustee Act 1925 (ie s 30(2) (repealed) did not contain the word 'properly' but this was in effect implied by the courts, and the case law accordingly remains relevant: see *Leedham v Chawner* (1858) 4 K & J 458; *Re Grimthorpe*[1958] Ch 615 at 623, [1958] 1 All ER 765 at 769; *Holding and Management Ltd v Property Holding and Investment Trust plc*[1990] 1 All ER 938, [1989] 1 WLR 1313, CA. A trustee is not allowed expenses which he has incurred unnecessarily (*Malcolm v O'Callaghan* (1837) 3 My & Cr 52 at 62, CA) or improperly (*Leedham v Chawner* supra; *Hosegood v Pedler* (1896) 66 LJQB 18).

3 Trustee Act 2000 s 31(1). This provision applies in relation to services provided to or on behalf of, or expenses incurred (on or after its commencement (ie 1 February 2001)) on behalf of, trusts whenever created: s 33(1). It seems that the phrase 'on or after its commencement' applies only to expenses. This provision does not apply to the Law Society (and presumably other similar bodies) exercising statutory public functions under statutory not private law trusts: *Re Ahmed & Co (a firm)* [2006] EWHC 480 (Ch), [2006] NLJR 512, [2006] All ER (D) 195 (Mar). However, a right to reimbursement of expenses and costs properly incurred may be implied: *Ahmed & Co (a firm)* supra at [145] per Lawrence Collins J. As to trusts imposed by statute in the context of a public function see PARA 624 note 1 ante.

4 Ie under a power conferred by the Trustee Act 2000 Pt IV (ss 11-27) or any other enactment or any provision of subordinate legislation or by the trust instrument: s 31(2).

5 Ibid s 31(2). For the meaning of 'custodian' see PARA 991 note 4 post.

6 See *Balsh v Hyham* (1728) 2 P Wms 453 at 455; *Re German Mining Co, ex p Chippendale* (1853) 4 De GM & G 19 at 54 et seq per Turner LJ; *James v May*(1873) LR 6 HL 328; *Jervis v Wolferstan*(1874) LR 18 Eq 18 at 24 per Jessel MR; *Fraser v Murdoch*(1881) 6 App Cas 855 at 872, HL, per Lord Blackburn; *Hobbs v Wayet*(1887) 36 ChD 256; *Hardoon v Belilios*[1901] AC 118, PC; *Hurst v Bryk*[2002] 1 AC 185, [2000] 2 All ER 193, HL. The right may subsist after the beneficiary has alienated his beneficial interest: *Matthews v Ruggles-Brise*[1911] 1 Ch 194.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/A. IN GENERAL/903. Remuneration of an agent, nominee or custodian under the Trustee Act 2000.

### **903. Remuneration of an agent, nominee or custodian under the Trustee Act 2000.**

Where a person other than a trustee has been authorised to exercise functions<sup>1</sup> as an agent of the trustees or appointed to act as a nominee or custodian<sup>2</sup>, the trustees may remunerate the agent, nominee or custodian out of the trust funds<sup>3</sup> for services if: (1) he is engaged on terms entitling him to be remunerated for those services; and (2) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him to or on behalf of that trust<sup>4</sup>.

The trustees may likewise reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him in exercising functions as an agent, nominee or custodian<sup>5</sup>.

1 'Functions' includes powers and duties: Trustee Act 2000 s 39(1).

2 I.e. under a power conferred by *ibid* Pt IV (ss 11-27) (see PARA 988 et seq post) or any other enactment or any provision of subordinate legislation, or by the trust instrument. 'Enactment' includes any provision of a measure of the Church Assembly or of the General Synod of the Church of England: s 39(1). 'Subordinate legislation' means Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act: Interpretation Act 1978 s 21(1); definition applied by the Trustee Act 2000 ss 6(3), 39(2). For the meaning of 'custodian' see PARA 991 note 4 post.

3 For the meaning of 'trust funds' see PARA 902 note 1 ante.

4 See the Trustee Act 2000 s 32(1), (2). Section 32 applies in relation to services provided to or on behalf of, or expenses incurred (on or after its commencement (i.e. 1 February 2001)) on behalf of, trusts whenever created: s 33(1). It seems that the phrase 'on or after its commencement' applies only to expenses.

5 *Ibid* s 32(3).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/A. IN GENERAL/904. Indemnity under the Trustee Act 1925 in respect of liabilities.

#### **904. Indemnity under the Trustee Act 1925 in respect of liabilities.**

The Trustee Act 2000 does not give trustees indemnity from liability for the acts of an agent appointed prior to its commencement in relation to property abroad<sup>1</sup>. In relation to such agents the protection formerly afforded by the Trustee Act 1925 whereby trustees must not by reason only of their having made such appointment be responsible for any loss arising thereby, may still continue<sup>2</sup>.

1 General agents appointed prior to the commencement of the Trustee Act 2000 (ie 1 February 2001) are treated as if appointed under that Act (see PARA 998 post), but agents appointed in relation to property abroad are not (see PARA 999 post).

2 See the Trustee Act 1925 s 23(2) (repealed, except in relation to the operation of an appointment made under s 23 before 1 February 2001, by the Trustee Act 2000 s 40(2), Sch 3 para 6). See PARA 999 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/A. IN GENERAL/905. Money expended in preserving trust property.

### **905. Money expended in preserving trust property.**

A trustee has a right to an equitable lien on the trust property and to an indemnity from it for money expended by him in its preservation<sup>1</sup>; and a person who at his request advances money for its preservation obtains a similar right by subrogation<sup>2</sup>. Thus, if a trustee has no trust funds for paying the premiums on a trust policy and applies his own money for keeping up the policy, he has a lien on the policy for the amount advanced by him for the purpose of keeping it on foot<sup>3</sup>. If, however, the beneficiaries supply funds or if the trustee, by duly performing his trust, ought to be in possession of funds applicable to that purpose, he acquires no lien on the policy and cannot confer one on another<sup>4</sup>.

1 *Clack v Holland* (1854) 19 Beav 262 at 273, 276-277 per Romilly MR; *Re Leslie, Leslie v French* (1883) 23 ChD 552 at 560; *Re Earl of Winchilsea's Policy Trusts* (1888) 39 ChD 168; *Re Jewell's Settlement, Watts v Public Trustee* [1919] 2 Ch 161. See *Re Regent's Canal Ironworks Co, ex p Grissell* (1875) 3 ChD 411, CA; *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

2 *Clack v Holland* (1854) 19 Beav 262 at 277; *Todd v Moorhouse* (1874) LR 19 Eq 69; *Re Leslie, Leslie v French* (1883) 23 ChD 552 at 560. See LIEN vol 68 (2008) PARA 870 et seq.

3 *Clack v Holland* (1854) 19 Beav 262 at 273, 276; *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

4 *Clack v Holland* (1854) 19 Beav 262 at 276-277. See also INSURANCE vol 25 (2003 Reissue) PARA 560.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/A. IN GENERAL/906. Costs incurred in reference to appointment.

**906. Costs incurred in reference to appointment.**

A trustee is entitled to be reimbursed out of the trust estate the costs which he has incurred before his appointment in obtaining a statement of the trust property and ascertaining that he is being duly appointed and the costs incidental to the appointment, and also the costs of former trustees paid by him to their representatives on obtaining a transfer of the trust property to himself<sup>1</sup>.

<sup>1</sup> *Harvey v Olliver* [1887] WN 149.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/B. COSTS OF LITIGATION/907. Limitations on the power of the court to award costs in favour of trustee.

## **B. COSTS OF LITIGATION**

### **907. Limitations on the power of the court to award costs in favour of trustee.**

In general<sup>1</sup>, costs of and incidental to all proceedings in the Civil Division of the Court of Appeal, the High Court and any county court, including the administration of estates and trusts, are in the discretion of the court<sup>2</sup>. Where, however, a person is or has been a party to any proceedings in the capacity of a trustee<sup>3</sup>, the general rule<sup>4</sup> is that he is entitled to be paid the costs of those proceedings out of the relevant trust fund<sup>5</sup> provided they are properly incurred<sup>6</sup>. Where he is so entitled, those costs will be assessed on the indemnity basis<sup>7</sup>. Whether costs were properly incurred depends on all the circumstances of the case, and may, for example, depend on: (1) whether the trustee obtained directions from the court before bringing or defending the proceedings<sup>8</sup>; (2) whether the trustee acted in the interests of the fund or in substance for a benefit other than that of the estate, including his own<sup>9</sup>; and (3) whether the trustee acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings<sup>10</sup>.

1    Is subject to the provisions of the Supreme Court Act 1981 or any other enactment and to rules of court. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force); see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

2    See the Supreme Court Act 1981 s 51(1), (4) (as substituted); and ADMINISTRATIVE LAW. As to the renaming of the Supreme Court Act 1981 see note 1 supra.

3    CPR 48.4(1)(a).

4    The general rule only applies in so far as the costs are not recovered from or paid by any other person: CPR 48.4(2).

5    CPR 48.4(2). The entitlement to an indemnity out of the trust fund may include costs awarded against the trustee in favour of another party: see *Practice Direction-General Rules about Costs* PD 43-48 para 50A.1; and CIVIL PROCEDURE vol 12 (2009) PARA 1807.

6    The court will not allow costs which have been unreasonably incurred or are unreasonable in amount: CPR 44.4(1). Any doubt as to whether costs were reasonably incurred or were reasonable in amount are resolved in favour of the receiving party: CPR 44.4(3).

7    CPR 48.4(3). CPR 48.4 does not apply where the case falls within CPR 48.3 (costs payable pursuant to a contract): CPR 48.4(1)(b). As to the indemnity basis see further CIVIL PROCEDURE vol 12 (2009) PARA 1747.

8    See *Practice Direction-General Rules about Costs* PD 43-48 para 50A.2(1); and CIVIL PROCEDURE vol 12 (2009) PARA 1807. Trustees may seek directions before the issue of proceedings by way of a 'Beddoe' application: see *Re Beddoe, Downes v Cottam*[1893] 1 Ch 547, CA; and see PARA 908 note 6 post. Where trustees are already parties the court may make an order deciding the incidence of costs in advance of the trial: *Westdock Realisations Ltd*[1988] BCLC 354, 4 BCC 192. As to the need to exercise caution in applying pre-CPR authorities see PARA 908 post; and see CIVIL PROCEDURE vol 12 (2009) PARA 1736. See also *Practice Note (trust proceedings: prospective costs orders)*[2001] 3 All ER 574.

9    See *Practice Direction-General Rules about Costs* PD 43-48 para 50A.2(2); and CIVIL PROCEDURE vol 12 (2009) PARA 1807. The trustee is not to be taken to have acted in substance for a benefit other than that of the fund by reason only that he has defended a claim in which relief is sought against him personally: *Practice*

*Direction-General Rules about Costs* PD 43-48 para 50A.3. As to a trustee acting for a benefit other than that of the trust fund see *Holding and Management Ltd v Property Holding and Investment Trust plc* [1988] 2 All ER 702, [1988] 1 WLR 644; affd [1990] 1 All ER 938, [1989] 1 WLR 1313, CA. As to the test applied on taxing trustee's counsel's fees see *Re Whitley, Lloyds Bank Ltd v Whitley* [1962] 3 All ER 45, [1962] 1 WLR 922. See also *Re Grimthorpe* [1958] Ch 615, [1958] 1 All ER 765; *Re Harrison's Settlement Trusts, Morris v Harrison-Sleap* [1965] 3 All ER 795, [1965] 1 WLR 1492; *Re Gibson's Settlement Trusts, Mellors v Gibson* [1981] Ch 179, [1981] 1 All ER 233 (allowance of costs before summons issued).

10 See *Practice Direction-General Rules about Costs* PD 43-48 para 50A.2(3); and CIVIL PROCEDURE vol 12 (2009) PARA 1807.

## **UPDATE**

### **907 Limitations on the power of the court to award costs in favour of trustee**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/B. COSTS OF LITIGATION/908. Case law relating to the entitlement of trustee to costs of proceedings.

### **908. Case law relating to the entitlement of trustee to costs of proceedings.**

There exists a large body of case law on the subject of a trustee's entitlement to the costs of legal proceedings which pre-dates the introduction of the Civil Procedure Rules ('CPR') and must therefore be treated with caution<sup>1</sup>.

The general principle<sup>2</sup> is that a trustee is entitled to be paid out of the trust property his full costs of legal proceedings which he has properly instituted or defended on behalf of the trust<sup>3</sup>.

An exception to the general principle has been held to exist where the proceedings result in the whole of the property being held to belong to third persons, as in the case where a voluntary settlement is avoided by the settlor's bankruptcy or on any other account, or where the instrument of trust is avoided by prior adverse interests; in such a case the trustee's costs have been held to be in the discretion of the court<sup>4</sup>. Where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, the duty of the trustee is to remain neutral and offer to submit to the court's direction<sup>5</sup>.

If in any doubt whether or not to institute or defend proceedings, trustees should apply to the court for directions since, if they are given permission to sue or defend, they will be entitled to their costs in any event<sup>6</sup>. The application should be made in separate proceedings and not by an application in subsisting proceedings<sup>7</sup>. On such an application the court is acting in an essentially administrative capacity: the proposed defendants are not entitled to be heard on the application or to be furnished with the evidence on which the court is asked to act<sup>8</sup>. If, however, trustees go ahead without the permission of the court, they do so at their own risk as to costs; and, if they fail, they will not receive their costs unless they establish that the costs were properly incurred<sup>9</sup>. Even if they have been advised by counsel that they have a good case, the trustees will not receive their costs unless the court is satisfied that it would have authorised the claim or defence, as the case may be, had an appropriate application been made<sup>10</sup>.

The court will not make a pre-emptive interim order for costs in what is essentially hostile litigation where the very existence of the trustee/beneficiary relationship is in issue, unless there are special circumstances present<sup>11</sup>. It may do so, however, in the case of a pension fund where a pension fund member alleges injury to the fund as a whole and seeks restitution on behalf of the fund. A pension fund is a special form of trust where, unlike an ordinary trust beneficiary, a pension fund member has given consideration for his interest. The relationship between the members is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered<sup>12</sup>.

1 Most of the procedural cases decided under the Rules of the Supreme Court or the County Court Rules will not be applied and are, at most, only persuasive in interpreting and giving effect to the provisions contained in the CPR: see CIVIL PROCEDURE VOL 12 (2009) PARA 1736.

2 The principle has been said to arise out of an implied term of the contract between a trustee and the author of the trust that the trustee should be indemnified in respect of all his costs and expenses properly incurred in the execution of the trust: *Cotterell v Stratton* (1872) 8 Ch App 295 at 302; *Turner v Hancock* (1882) 20 ChD 303, CA; *Easton v Landor* (1892) 2 R 176 at 177, CA; *Re Grimthorpe* [1958] Ch 615 at 623, [1958] 1 All ER 765 at 769; *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745, [1966] 1 WLR 920. However, in *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA, the court rejected any contractual basis for the remuneration of trustees under a charging clause in the trust

instrument. Similarly, it seems better to treat the right to reimbursement as an equitable right rather than a contractual right.

3 *Fearn v Young* (1804) 10 Ves 184; *Jenour v Jenour* (1805) 10 Ves 562; *Dunkin v Ward* (1837) 1 Jur 735; *York v Brown* (1844) 1 Coll 260; *Stephens v Lord Newborough* (1848) 11 Beav 403; *Lord Muskerry v Skeffington* (1868) LR 3 HL 144; *Courtney v Rumley* (1871) IR 6 Eq 99; *Re Chennell, Jones v Chennell* (1878) 8 ChD 492, CA; *Re Love, Hill v Spurgeon* (1885) 29 ChD 348, CA; *Budgett v Budgett* [1895] 1 Ch 202; *Merry v Pownall* [1898] 1 Ch 306; *Re Robertson, Public Trustee v Robertson* [1949] 1 All ER 1042; *Re Harrison's Settlement Trusts, Morris v Harrison-Sleap* [1965] 3 All ER 795, [1965] 1 WLR 1492; *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745, [1966] 1 WLR 920. See, however, *Hearn v Wells* (1844) 1 Coll 323. See also *Re Dargie, Miller v Thornton-Jones* [1954] Ch 16, [1953] 2 All ER 557; and PARA 910 note 6 post. If there is a doubt whether the costs have been properly incurred, the trustee is entitled to the benefit of it: *Easton v Landor* (1892) 2 R 176 at 177, CA, per Lindley LJ. A trustee accepting the office from a defaulting trustee pending a suit for the defaulter's removal has been deprived of his costs: *Peatfield v Benn* (1853) 17 Beav 522. A trustee's right to costs is not affected by the absence of a co-trustee: *Storer v Storer* (1894) 71 LT 704. The fact that a trustee has security for his costs may be a reason for postponing the appointment of new trustees until the question of costs has been settled: *Re Pauling's Settlement Trusts (No 2), Younghusband v Coutts & Co* [1963] Ch 576, [1963] 1 All ER 857.

4 *Mohun v Mohun* (1818) 1 Swan 201; *Edenborough v Archbishop of Canterbury* (1826) 2 Russ 93 at 112 per Lord Eldon LC; *Townsend v Westacott* (1841) 4 Beav 58; *Hearn v Wells* (1844) 1 Coll 323; *Elsev v Lutyens* (1850) 8 Hare 159 at 165; *Heap v Tonge* (1851) 9 Hare 90 at 105; *Everitt v Everitt* (1870) LR 10 Eq 405; *Mackay v Douglas* (1872) LR 14 Eq 106 at 123; *Re Butterworth, ex p Russell* (1882) 19 ChD 588, CA; *Dutton v Thompson* (1883) 23 ChD 278, CA; *James v Couchman* (1885) 29 ChD 212; *Re Holden, ex p Official Receiver* (1887) 20 QBD 43; *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157 at 174 et seq; *Bullock v Lloyds Bank Ltd* [1955] Ch 317, [1954] 3 All ER 726 (where a settlement made by an unmarried woman shortly after coming of age was set aside on the grounds of undue influence and lack of independent advice, and the court held that, although the defendant bank trustee had no contractual right to its costs, nevertheless it ought to have its full taxed costs and expenses in exactly the same way as though there were an unexceptional trust); *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32, [1988] 3 All ER 71; *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.

5 *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220. For an analysis and criticism of this decision see Sinel 'Trustees' Timidity' (2005) TELTJ 25.

6 *Chettiar v Chettiar (No 2)* [1962] 2 All ER 238 at 245, [1962] 1 WLR 279 at 290, PC; *Re Dellaway* [1982] 3 All ER 118, [1982] 1 WLR 756; *McDonald v Horn* [1995] 1 All ER 961, CA. If the trustees do not apply to the court before bringing or defending proceedings, they will not be allowed the costs of the proceedings unless it was proper for them to bring or defend the proceedings as the case may be: *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547; CA; *Dagnell v JL Freedman & Co (a firm)* [1993] 2 All ER 161, [1993] 1 WLR 388, HL. As to the right of trustees generally to apply to the court to determine their right course of action see PARAS 1057, 1070 post. As to the costs of beneficiaries see *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406, 76 LJ Ch 584; *McDonald v Horn* [1995] 1 All ER 961, [1995] ICR 685, CA; *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755, [1999] 1 WLR 347; *D'Abo v Paget (No 2)* [2000] All ER (D) 1110, (2000) Times, 10 August (a more robust attitude to costs is appropriate following the introduction of the CPR but the guidelines in *Re Buckton* supra have not been superseded); *Trustee Corporation Ltd v Nadir* [2000] All ER (D) 2249 (court refused to extend the pre-emptive costs jurisdiction to a hostile claim by one alleged beneficiary against another); *Chessels v British Telecommunications plc* [2001] All ER (D) 332 (Dec) (where beneficiaries make a hostile claim against other beneficiaries or trustees a pre-emptive costs order should only be made where no other order could properly be made by the court which is to hear the proceedings). See also *Practice Note (trust proceedings: prospective costs orders)* [2001] 3 All ER 574.

7 *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.

8 *Re Moritz* [1960] Ch 251, [1959] 3 All ER 767; *Craig v Humberclyde Industrial Finance Group Ltd* [1999] 1 WLR 129, sub nom *Re Hinckley Island Hotel Ltd, Craig v Humberclyde Industrial Finance Group Ltd* [1998] 2 BCLC 526, CA.

9 *Singh v Bhasin* (1998) Times, 21 August.

10 *Singh v Bhasin* (1998) Times, 21 August.

11 *National Anti-Vivisection Society Ltd v Duddington* (1989) Times, 23 November; *Re Biddencare Ltd* [1994] 2 BCLC 160; *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.

12 *McDonald v Horn* [1995] 1 All ER 961, CA. See *Re Exchange Securities and Commodities Ltd (No 2)* [1987] 2 All ER 272, [1985] BCLC 392; *Re Charge Card Services Ltd* [1986] 3 All ER 289, [1986] BCLC 316; *Re*



*Westdock Realisations Ltd* [1988] BCLC 354; *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/B. COSTS OF LITIGATION/909. Costs of appearance by trustees on an appeal.

### **909. Costs of appearance by trustees on an appeal.**

Where there is an appeal, for example on a point of construction, in proceedings to determine the rights of beneficiaries under a trust, it seems that trustees will normally be allowed their costs of appearing on the appeal by their own counsel<sup>1</sup>. Prima facie an administrator does not act unreasonably in appearing on an appeal for the purpose of supporting an order giving him liberty to carry out a transaction<sup>2</sup>.

1 *Re Stuart, Johnson v Williams* [1940] 4 All ER 80, CA (where the appeal was dismissed with costs and the trustees obtained the difference between what used to be party and party costs and common fund costs out of the estate). In this case Clauson LJ appears to have thought that there might be some cases in which it would be unreasonable for the trustees to appear and that in such a case the court, in determining the liability of an unsuccessful appellant for costs, might have regard to the fact that he had notified the trustees that he would object to their being separately represented: *Re Stuart, Johnson v Williams* supra at 81-82. Cf *Catterson v Clark* (1906) 95 LT 42, CA, per Romer LJ, explaining dicta in *Carroll v Graham* [1905] 1 Ch 478, CA. For a case where trustees were disallowed costs see *Re Barry's Trusts, Barry v Smart* [1906] 2 Ch 358, CA. However, the more recent practice is to say that the trustees ought to appear in the Court of Appeal, because it is necessary for them to see that the order which relates to the administration of the estate is properly carried out, and it would be contrary to that practice to deprive trustees of their costs in the Court of Appeal: *Re Stuart, Johnson v Williams* supra at 82 per Luxmoore LJ. See *Re Londonderry's Settlement* [1965] Ch 918, [1964] 3 All ER 855, CA.

2 *Chettiar v Chettiar (No 2)* [1962] 2 All ER 238 at 245, [1962] 1 WLR 279 at 290, PC.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(i) Reimbursement and Indemnity/B. COSTS OF LITIGATION/910. Liability of trustee for costs.

## 910. Liability of trustee for costs.

A trustee will not be allowed to charge against the trust property the costs of unnecessary proceedings<sup>1</sup> or of elaborate proceedings where he might have obtained his object by a simpler and less expensive procedure<sup>2</sup>. Accordingly, where a trustee incurs or by his conduct occasions excessive or unnecessary costs in respect of the trust estate, he is deprived of his costs<sup>3</sup> and may be held personally liable to pay the costs of the proceedings so far as they are excessive or unnecessary<sup>4</sup>. Counsel's opinion does not always and necessarily justify a trustee in bringing or defending proceedings<sup>5</sup>.

Where a trustee institutes or defends proceedings in order to have a point relating to his private interest decided at the expense of the trust estate, he will be ordered to pay the costs<sup>6</sup>.

The costs of legal proceedings occasioned by the misconduct of a trustee are in the discretion of the court, which will generally order the trustee to pay them<sup>7</sup>.

1 *Norris v Norris* (1785) 1 Cox Eq Cas 183; *Knight v Martin* (1829) 1 Russ & M 70; *Angier v Stannard* (1834) 3 My & K 566 at 572; *Campbell v Home* (1842) 1 Y & C Ch Cas 664 at 670; *Cockcroft v Sutcliffe* (1856) 2 Jur NS 323; *Horner v Wheelwright* (1857) 2 Jur NS 367; *Smith v Bolden* (1863) 33 Beav 262; *Re Cull's Trusts* (1875) LR 20 Eq 561; *Re England's Settlement Trusts, Dobb v England* [1918] 1 Ch 24. In a proper case, a trustee ought to join with the beneficiaries in instituting proceedings if requested to do so instead of being made a defendant to them: *Reade v Sparkes* (1827) 1 Mol 8. Trustees who appeared in proceedings between beneficiaries without having been served were not allowed their costs: *Bennett v Biddles* (1846) 10 Jur 534.

2 *Thomas v Walker* (1854) 18 Beav 521; *Wells v Malbon* (1862) 31 Beav 48. As to apportioning the costs of administration proceedings between two estates see *Re Allen, Wheeler v Foster* [1889] WN 132. As to the costs of trustees in connection with the payment out of court of funds paid in under administration proceedings see *Lowe v Moore* [1906] WN 142. As to the costs of administration proceedings generally see *Day v Croft* (1854) 19 Beav 518; *Re Mill's Estate, ex p Works and Public Buildings Comrs* (1886) 34 ChD 24 at 33, CA, per Cotton LJ. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 436.

3 *Re Knight's Will* (1884) 26 ChD 82, CA. See also *Re Scowby, Scowby v Scowby* [1897] 1 Ch 741, CA.

4 *Campbell v Campbell* (1837) 2 My & Cr 25; *Wilson v Wilson* (1838) 2 Keen 249; *Burrows v Greenwood* (1840) 4 Y & C Ex 251 at 255; *Penfold v Bouch* (1844) 4 Hare 271; *Firmin v Pulham* (1848) 2 De G & Sm 99; *Price v Loaden* (1856) 21 Beav 508; *Eddowes v Eddowes* (1862) 30 Beav 603; *Patterson v Wooler* (1876) 2 ChD 586; *Re Cabburn, Gage v Rutland* (1882) 46 LT 848; *Re Chapman, Freeman v Parker* (1894) 72 LT 66, CA; *Re Holton's Settlement Trusts, Holton v Holton* (1918) 88 LJ Ch 444; *Bowen-Jones v Bowen-Jones* [1986] 3 All ER 163. See also *Re Holberton's Settlement Trusts, Thorburn v Hart* [1953] 2 All ER 506n, [1953] 1 WLR 1080 (where Danckwerts J overruled the taxing master in allowing a trustee costs relating to brief fees to leading and junior counsel, the briefs having been delivered when terms of compromise requiring the approval of the court had been provisionally agreed).

5 *Devey v Thornton* (1851) 9 Hare 222 at 232 per Turner V-C; *Stott v Milne* (1884) 25 ChD 710 at 714, CA, per Lord Selborne LC. See, however, PARA 948 note 4 post.

6 *Henley v Philips* (1740) 2 Atk 48; *Irwin v Rogers* (1848) 12 I Eq R 159. Where litigation is designed to define and secure the personal rights of the trustees as individuals, there is no rule that the trustees are entitled to their costs on an indemnity basis: *Re Dargie, Miller v Thornton-Jones* [1954] Ch 16 at 20-21, [1953] 2 All ER 577 at 580.

7 *Dawson v Parrot* (1791) 3 Bro CC 236; *Ankers v Sandford* (1840) 4 Jur 817; *Froste v Hamilton* (1842) 6 Jur 525; *Turquand v Knight* (1845) 14 Sim 643; *Wilson v Parker* (1846) 10 Jur 979; *Byrne v Norcott* (1851) 13 Beav 336 at 346 per Lord Langdale MR; *Marshall v Sladden* (1851) 4 De G & Sm 468; *A-G v Murdoch* (1856) 2 K & J 571; *Kendall v Marsters* (1860) 2 De GF & J 200; *Grierson v Astle* (1860) 3 LT 288; *Palairt v Carew* (1863) 32

Beav 564; *Birks v Micklethwaite* (1864) 34 LJ Ch 362; *Hemry v Macdonald* (1866) 15 WR 165; *Naylor v Smith* (1867) 15 WR 528; *Gough v Etty* (1869) 20 LT 358; *Griffin v Brady* (1869) 39 LJ Ch 136; *Easton v Landor* (1892) 2 R 176, CA; *Re Hodgkinson, Hodgkinson v Hodgkinson* [1895] 2 Ch 190, CA; *Re Knox's Trusts* [1895] 2 Ch 483, CA. As to the costs of administration claims see PARA 911 post; and as to the cost of proceedings rendered necessary by a breach of trust see PARA 1110 et seq post. Trustees are not relieved from liability to pay the costs of proceedings which their misconduct has occasioned by a direction in the trust instrument that, if a beneficiary institutes proceedings for the administration of the trust estate, the costs of all parties are to be paid out of his share: *Re Williams, Williams v Williams* [1912] 1 Ch 399.

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## 911. Claim for account or administration.

Where a beneficiary brings a claim against the trustee for an account or for the administration of the trust estate, the trustee bears his own costs if and so far as the claim has been occasioned by his neglect or default<sup>1</sup>, and may be ordered to pay the costs of the beneficiary<sup>2</sup>. The trustee is, however, allowed his costs out of the trust estate, or the beneficiary's share of it, if his conduct has been honest and correct<sup>3</sup>, even though it may have been mistaken<sup>4</sup>; and the beneficiary or his solicitor may be ordered to bear the costs of the claim personally if that claim has been commenced wrongfully or too hastily<sup>5</sup>. Where the claim was necessary independently of a breach of trust committed by the trustee, he is liable to pay the special costs attributable to the breach of trust, but may be allowed his general cost<sup>6</sup> of the claim after he has made good the loss occasioned by the breach<sup>7</sup>.

Where a claim is brought for the determination of a question for the benefit of all concerned, the costs of all parties will normally come out of the estate, even though it may in form be adverse litigation<sup>8</sup>. Where the trustees were able and willing to bring a claim themselves, a claimant beneficiary has been refused costs even though the claim succeeded<sup>9</sup>.

<sup>1</sup> *Simpson v Bathurst, Shepherd v Bathurst* (1869) 5 Ch App 193 at 202 per Lord Hatherley LC; *Paynes v Evens* (1874) LR 18 Eq 356; *Re Page, Jones v Morgan* [1893] 1 Ch 304.

<sup>2</sup> *Newton v Askew* (1848) 11 Beav 145 at 152 per Lord Langdale MR; *Springett v Dashwood* (1860) 2 Giff 521; *Eglin v Sanderson* (1862) 3 Giff 434; *Hilliard v Fulford* (1876) 4 ChD 389 at 394; *Re Hayter, Re Wallett, Hayter v Wells* (1883) 32 WR 26; *De Burgh v M'Clintock* (1883) 11 LR Ir 220; *Re Knox's Trusts* [1895] 2 Ch 483, CA; *Re Skinner, Cooper v Skinner* [1904] 1 Ch 289. A trustee may be ordered to pay the costs of taking an account if he has by indefensible conduct occasioned expense and delay in the taking of the account: *Re Holton's Settlement Trusts, Holton v Holton* (1918) 88 LJ Ch 444. As to accounts see EQUITY vol 16(2) (Reissue) PARA 449 et seq.

<sup>3</sup> *Ottley v Gilby* (1845) 8 Beav 602; *Thompson v Clive* (1848) 11 Beav 475; *Re Andrews, Edwards v Dewar* (1885) 30 ChD 159.

<sup>4</sup> *Whitmarsh v Robertson* (1842) 1 Y & C Ch Cas 715; *Smith v Cremer* (1875) 24 WR 51; *Bullock v Lloyds Bank Ltd* [1955] Ch 317, [1954] 3 All ER 726. Where a trustee is made a defendant to proceedings in which his conduct is impugned, he is entitled to the costs of briefing two counsel, even though the claimant claims no relief against him personally and professes to sue him only as trustee: *Bruty v Edmundson* [1918] 1 Ch 112, CA.

<sup>5</sup> *Aylmer v Winterbottom* (1857) 4 Jur NS 19; *Fane v Fane* (1879) 13 ChD 228; *Re Andrews, Edwards v Dewar* (1885) 30 ChD 159; *Re Dartnall, Sawyer v Goddard* [1895] 1 Ch 474, CA. Cf EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 436.

<sup>6</sup> *Pride v Fooks* (1840) 2 Beav 430; *Campbell v Bainbridge* (1868) LR 6 Eq 269 at 274 per Stuart V-C; *Bell v Turner* (1877) 47 LJ Ch 75. See also PARA 1113 post. As to apportioning the costs of a defaulting and insolvent trustee and a solvent trustee who appear together see *McEwan v Crombie* (1883) 25 ChD 175.

<sup>7</sup> *Lewis v Trask* (1882) 21 ChD 862; *Re Basham, Hannay v Basham* (1883) 23 ChD 195; *Re Knott, Bax v Palmer* (1887) 56 LJ Ch 318.

<sup>8</sup> *Re Buckton* [1907] 2 Ch 406.

<sup>9</sup> *D'Abo v Paget (No 2)* [2000] All ER (D) 1110, (2000) Times, 10 August (where the sole reason that the claimant brought the proceedings was to make a claim for costs in the event that the first defendant lost). The guidelines in *Re Buckton* [1907] 2 Ch 406 still apply, but under the CPR the court will take a more robust attitude: *D'Abo v Paget (No 2)* supra.



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## 912. Joinder of several trustees.

Where there is more than one trustee, both or all ought to sue or defend jointly, and they are only allowed one set of costs<sup>1</sup>, except where a severance is necessary or proper owing to one of them being a beneficiary<sup>2</sup>, or being attacked hostilely<sup>3</sup>, or for some other good reason<sup>4</sup>.

1 *Nicholson v Falkiner* (1830) 1 Mol 555; *Holcombe v Jones* (1831) 1 LJ Ch 46; *Young v Scott* (1834) 1 Jo Ex Ir 71; *Gaunt v Taylor* (1840) 2 Beav 346; *Allen v Thorp* (1843) 7 Beav 72; *Cooke v Lord of Courtown* (1844) 6 I Eq R 266 at 279; *Farr v Sheriffe*, *Dykes v Farr* (1845) 4 Hare 512 at 528; *Wiles v Cooper* (1846) 9 Beav 294 at 298; *Hughes v Key* (1855) 20 Beav 395; *Hodson v Cash* (1855) 1 Jur NS 864; *Course v Humphrey* (1859) 26 Beav 402; *Prince v Hine (No 2)* (1859) 27 Beav 345; *A-G v Wyville* (1860) 28 Beav 464; *Gompertz v Kensit* (1872) LR 13 Eq 369 at 381 per Bacon V-C; *Hosegood v Pedler* (1896) 66 LQB 18; *Re Isaac, Cronbach v Isaac* [1897] 1 Ch 251 at 255-256, CA. As to the position where one trustee is solvent and the other is insolvent and in default see *McEwan v Crombie* (1883) 25 ChD 175.

2 *Re Love, Hill v Spurgeon* (1885) 29 ChD 348, CA.

3 *Webb v Webb* (1847) 16 Sim 55; *Cummins v Bromfield* (1857) 3 Jur NS 657; *Re Maddock Butt v Wright* [1899] 2 Ch 588. In such a case he may appear by two counsel at the hearing: *Re Maddock, Butt v Wright* supra; *Bruty v Edmundson* [1918] 1 Ch 112, CA.

4 *Kampf v Jones* (1837) Coop Pr Cas 13; *Aldridge v Westbrook* (1842) 4 Beav 212; *Dudgeon v Cormley* (1843) 2 Con & Law 422; *Woods v Woods* (1846) 5 Hare 229; *Re Isaac, Cronbach v Isaac* [1897] 1 Ch 251 at 255. Cases where severance is reasonable include: (1) where one trustee has a personal interest which conflicts with his duty as trustee; (2) where allegations of fraud or improper conduct are made against one trustee; and (3) where one trustee is able to admit facts which the others do not believe to be true: see *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745, [1966] 1 WLR 920.

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### **913. Right of appeal.**

In proceedings relating to a trust, permission is generally required for an appeal from a decision of a judge in a county court or the High Court<sup>1</sup>.

<sup>1</sup> See the Access to Justice Act 1999 s 54; CPR 52.3(1); and CIVIL PROCEDURE vol 12 (2009) PARA 1659 et seq.



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## (ii) Protection against Liability

### 914. Protection against liability in respect of rents and covenants after distribution.

Where a trustee liable as such for:

- 178 (1) any rent, covenant or agreement reserved by or contained in any lease<sup>1</sup>; or
- 179 (2) any rent, covenant or agreement payable under or contained in any grant<sup>2</sup> made in consideration of a rentcharge<sup>3</sup>; or
- 180 (3) any indemnity given in respect of any such rent, covenant or agreement mentioned in head (1) or head (2) above<sup>4</sup>,

satisfies all liabilities under the lease or grant which may have accrued and been claimed up to the date of the conveyance and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, even if the period for laying it out has not arrived, then the trustee may convey the property demised or granted to a purchaser or other person entitled to call for a conveyance<sup>5</sup>. The trustee may then distribute the trust estate (other than the fund, if any, set apart) to or among the persons entitled to it, without appropriating any part, or any further part, as the case may be, of the trust estate to meet any future liability under the lease or grant<sup>6</sup>. Notwithstanding such distribution, he will not be personally liable in respect of any subsequent claim under the lease or grant<sup>7</sup>.

Further, where a trustee as such has entered into an authorised guarantee agreement<sup>8</sup> with respect to any lease comprised in a trust estate, and he has satisfied all liabilities that may have accrued and been claimed up to the date of distribution, he may distribute the trust estate to or among the persons entitled to it, without appropriating any part of the estate to meet any future liability under any such agreement and notwithstanding any potential liability of his to enter into any such agreement<sup>9</sup>. Notwithstanding such distribution, he is not personally liable in respect of any subsequent claim under the agreement<sup>10</sup>.

1 Trustee Act 1925 s 26(1)(a). For these purposes, 'lease' includes an underlease and an agreement for a lease or underlease and any instrument giving any indemnity or varying the liabilities under the lease; and 'lessee' includes persons deriving title under the lessee: s 26(3).

2 For these purposes, 'grant' applies to a grant whether the rent is created by limitation, grant, reservation or otherwise and includes an agreement for a grant and any instrument giving an indemnity or varying the liabilities under the grant; and 'grantee' includes persons deriving title under the grantee: *ibid* s 26(3).

3 *Ibid* s 26(1)(b).

4 *Ibid* s 26(1)(c).

5 *Ibid* s 26(1) (amended by the Law of Property (Amendment) Act 1926 ss 7, 8(2), Schedule).

6 Trustee Act 1925 s 26(1) (as amended: see note 5 *supra*).

7 Ibid s 26(1) (as amended: see note 5 supra). Section s 26(1) (as amended) protects only trustees as such and so does not protect them against personal liability if they take possession of the property: *Re Owers, Public Trustee v Death*[1941] Ch 389, [1941] 2 All ER 589; *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher*[1943] 1 All ER 467. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 407-408.

The Trustee Act 1925 s 26 (as amended) operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the trust property into the hands of the persons amongst whom the same may have been respectively distributed and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust: s 26(2).

8 See the Landlord and Tenant (Covenants) Act 1995 ss 16, 28; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 289.

9 Trustee Act 1925 s 26(1A) (added by the Landlord and Tenant (Covenants) Act 1995 s 30(1), Sch 1 para 1).

10 Trustee Act 1925 s 26(1A) (as added: see note 9 supra).

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## 915. Protection by means of advertisements.

With a view to the conveyance<sup>1</sup> to or distribution among the persons entitled to any real or personal property, the trustees of a settlement<sup>2</sup>, trustees of land<sup>3</sup>, or trustees for sale of personal property may give notice, by advertisement in the London Gazette and in a newspaper circulating in the district in which the land is situated<sup>4</sup> and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in a claim for administration<sup>5</sup>, of their intention to make the conveyance or distribution<sup>6</sup>. The notice may require any person interested to send to the trustees within the time, not being less than two months, fixed by the notice or, where more than one notice is given, the last of the notices, particulars of his claim in respect of the property or any part of it to which the notice relates<sup>7</sup>. At the expiration of the time fixed by the notice, the trustees may convey or distribute the property, or any part of it to which the notice relates, to or among the persons entitled to it, having regard only to the claims, whether formal or not, of which the trustees then had notice; and, as respects the property so conveyed or distributed, they are not liable to any person of whose claim they have not had notice at the time of the conveyance or distribution<sup>8</sup>.

1 For the meaning of 'conveyance' see PARA 875 note 15 ante.

2 For the meaning of 'settlement' see PARA 804 note 1 ante.

3 For the meaning of 'trust of land' see PARA 605 note 5 ante.

4 On similar language in other statutes it has been held that *The Sporting Life* circulates in Westminster (*R v Westminster Betting Licensing Committee, ex p Governors of Peabody Donation Fund* [1963] 2 QB 750, [1963] 2 All ER 544, DC) and that *The Times* is a local newspaper circulating in Rickmansworth (*Re Southern Builders and Contractors (London) Ltd* (1961) Times, 10 October).

5 See *Re Bracken, Doughty v Townson* (1889) 43 ChD 1, CA; *Re Letherbrow, Hopp v Dean* [1935] WN 34; *Re Holden, Isaacson v Holden* [1935] WN 52.

6 Trustee Act 1925 ss 27(1), 68(1) PARA (4) (s 27(1) amended by the Law of Property (Amendment) Act 1926 ss 7, 8(2), Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(7)). The Trustee Act 1925 s 27 (as amended) applies notwithstanding anything to the contrary in the instrument, if any, creating the trust: s 27(3).

7 Ibid s 27(1) (as amended: see note 6 supra). 'Persons interested' includes creditors and next of kin or presumably beneficiaries under a will: *Re Aldhous, Noble v Treasury Solicitor* [1955] 2 All ER 80, [1955] 1 WLR 459.

8 Trustee Act 1925 s 27(2); and see *Re Frewen, Frewen v Frewen* (1889) 60 LT 953. Nothing in the Trustee Act 1925 s 27 (as amended): (1) prejudices the right of any person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it; or (2) frees the trustees from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain: s 27(2)(a), (b). See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 382-383. As to the right of a trustee to protect himself by asking the court for directions see PARAS 1057, 1070 post. As to the following of trust property generally see PARA 1134 post; and EQUITY vol 16(2) (Reissue) PARAS 861-866. It has been recommended that, where trustees have received the advice of counsel to distribute notwithstanding a possible adverse claim, similar protection should be afforded, but only if the trustees first wrote to the potential creditor and no claim was made within three months thereafter: see *Powers and Duties of Trustees* (23rd Report of the Law Reform Committee) (Cmd 8733) (1982) PARA 5.1.

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## **916. Statutory protection against liability for distributions made without regard to certain relationships.**

A trustee is not under a duty<sup>1</sup> to inquire, before conveying or distributing any property, whether any person is illegitimate or has been adopted by one of his natural parents, and could be legitimated (or if deceased be treated as legitimated), if that fact could affect entitlement to the property<sup>2</sup>. Nor need he inquire, where such fact could affect entitlement to the property, whether any adoption has been effected or revoked<sup>3</sup> or whether a full gender recognition certificate<sup>4</sup> has been issued to any person or revoked<sup>5</sup>. Furthermore, a trustee is not liable to any person by reason of a conveyance or distribution made without regard to such facts if he has not received notice of the fact before the conveyance or distribution<sup>6</sup>. There is no longer any similar protection in relation to illegitimate persons<sup>7</sup>; trustees should therefore take advantage of their right to protection by means of advertisements<sup>8</sup>.

1    le by virtue of the law relating to trusts.

2    See the Legitimacy Act 1976 s 7(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125 et seq.

3    See the Adoption Act 1976 s 45(1); the Adoption and Children Act 2002 s 72(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 378. The Adoption Act 1976 s 45 applies with like effect to parental orders made under the Human Fertilisation and Embryology Act 1990 s 30(1): see the Parental Orders (Human Fertilisation and Embryology) Regulations 1994, SI 1994/2767, reg 2, Sch 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 106. These regulations provide for the application with modification of certain provisions of the Adoption Act 1976 to parental orders in favour of gamete donors under the Human Fertilisation and Embryology Act 1990 s 30(1) and, notwithstanding the repeal of the relevant provisions of the Adoption Act 1976, continue to have effect for the purpose of their application in relation to such parental orders: Adoption and Children Act 2002 (Commencement No 10 Transitional and Savings Provisions) Order 2005, SI 2005/2897, art 14.

4    Where a full gender recognition certificate is issued, the person's gender becomes the acquired gender for all purposes: see the Gender Recognition Act 2004 s 9(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. The fact that a person's gender has become the acquired gender under the Act does not affect the disposal or devolution of property under a will or other instrument made before 4 April 2005 (being the appointed day): s 15; Gender Recognition Act 2004 (Commencement Order) 2005, SI 2005/54, art 2.

5    See the Gender Recognition Act 2004 s 17(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

6    See the Legitimacy Act 1976 s 7(2); the Adoption Act 1976 s 45(2); the Adoption and Children Act 2002 s 72(2); the Gender Recognition Act 2004 s 17(2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 131, 378; CONSTITUTIONAL LAW AND HUMAN RIGHTS. These provisions do not prejudice the right of a person to follow the property, or any property representing it, into the hands of another person who has received it unless that person has purchased it for value and in good faith and without notice: see the Legitimacy Act 1977 s 7(3); the Adoption Act 1976 s 45(3); the Adoption and Children Act 2002 s 72(3); the Gender Recognition Act 2004 s 17(3); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 131, 378; CONSTITUTIONAL LAW AND HUMAN RIGHTS.

7    le since the repeal of the Family Law Reform Act 1969 s 17 by the Family Law Reform Act 1987 s 33(4), Sch 4 (see WILLS vol 50 (2005 Reissue) PARA 638).

8    le under the Trustee Act 1925 s 27: see PARA 915 ante.

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### (iii) Payment into Court by Trustees

#### 917. Payment into court generally.

Trustees, or the majority of trustees, having in their hands or under their control money or securities<sup>1</sup> belonging to a trust may pay the same into court<sup>2</sup>, and the receipt or certificate of the proper officers is a sufficient discharge to trustees for the money or securities so paid into court<sup>3</sup>. Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other trustees or trustee cannot be obtained, the court may order the payment into court to be made by the majority without that concurrence<sup>4</sup>. Where any such money or securities are deposited with any banker, broker or other depositary, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court<sup>5</sup>; and every transfer, payment and delivery made in pursuance of any such order is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered<sup>6</sup>.

1 For these purposes, 'securities' includes stocks, funds and shares: Trustee Act 1925 s 68(1) PARA (13) (amended by the Administration of Justice Act 1965 s 17(1), Sch 1).

2 Trustee Act 1925 s 63(1) (amended by the Administration of Justice Act 1965 s 36(4), Sch 3). For the meaning of 'the court' see PARA 632 note 3 ante. As to the jurisdiction of the county court in relation to payment into court by trustees see PARAS 641-642 ante. Any reference in the Trustee Act 1925 to paying money or securities into court is to be construed as referring to paying the money or transferring or depositing the securities into or in the Supreme Court or into or in any other court that has jurisdiction; and any reference to payment of money or securities into court is to be construed, with reference to an order of the High Court, as referring to payment of the money or transfer or deposit of the securities into or in the Supreme Court, and, with reference to an order of any other court, as referring to payment of the money or transfer or deposit of the securities into or in that court: s 68(2) (added by the Administration of Justice Act 1965 s 17(1), Sch 1). As from a day to be appointed, the words 'Senior Courts' are substituted for the words 'Supreme Court' by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 4(1), (3). At the date at which this volume states the law no such day had been appointed.

The trustees for the time being may make the lodgment: *Re Parry* (1848) 6 Hare 306. Trustees of a charitable fund may lodge it in court without the consent of the Charity Commission (formerly the Charity Commissioners): *Re Poplar and Blackwall Free School* (1878) 8 ChD 543. The procedure may be resorted to by life assurance companies (see the Life Assurance Companies (Payment into Court) Act 1896; and INSURANCE vol 25 (2003 Reissue) PARAS 561-562), but may not be resorted to by purchasers from trustees (*Re Buckley's Trust* (1853) 17 Beav 110) or bankers (see *Re Thakeham Sequestration Moneys* (1871) LR 12 Eq 494; *Re Sutton's Trusts* (1879) 12 ChD 175; and PARA 621 ante) or other persons or bodies holding money otherwise than as trustees (*Matthew v Northern Assurance Co* (1878) 9 ChD 80; *Re Sutton's Trusts* supra). As to the procedure see PARA 920 post.

3 Trustee Act 1925 s 63(2). As to the procedure for the lodgment of funds into court see the Court Funds Rules 1987, SI 1987/821, Pt II (rr 13-24) (as amended). As to the management and investment of funds paid into, or under the custody of, both the High Court and a county court see the Administration of Justice Act 1982 s 38 (as amended). See generally CIVIL PROCEDURE; COURTS. The trustee ought to lodge in court the fund itself and not merely a dividend on it: *Re Glendenning* [1867] WN 191. He is entitled to deduct and retain the costs and expenses of the lodgment of the fund before lodging it in court, and any question as to the propriety of his doing so must be challenged by a separate proceeding (*Re Parker's Will* (1888) 39 ChD 303, CA); or he can obtain payment of these costs and expenses out of the fund in court (*Beatty v Curson* (1868) LR 7 Eq 194; *Re Whitton's Trusts* (1869) LR 8 Eq 352). As to the procedure on a lodgment in court by a trustee see PARA 920 post.

4 Trustee Act 1925 s 63(3). As to the court's power to order a trust fund to be paid into court where it is necessary or expedient for the preservation of the trust estate or the due performance of the trust see PARA 1069 post.

5 Ibid s 63(4).

6 Ibid s 63(5).

### **UPDATE**

### **917 Payment into court generally**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iii) Payment into Court by Trustees/918. Circumstances in which payment into court is justifiable.

### **918. Circumstances in which payment into court is justifiable.**

A trustee is justified in lodging a trust fund in court where he has a genuine doubt as to the person entitled to it<sup>1</sup> or where, owing to the beneficiary not being sui juris, or for any other reason, he cannot otherwise get an effectual discharge for it<sup>2</sup>.

1 *Re Lane's Trust* (1854) 3 WR 134; *Re Headington's Trust* (1857) 6 WR 7; *Re Wright's Trusts* (1857) 3 K & J 419; *Re Wyll's Trusts* (1860) 28 Beav 458; *Re Brocklesby* (1861) 29 Beav 652; *Re Metcalfe's Trusts* (1864) 2 De GJ & Sm 122; *Hockey v Western* [1898] 1 Ch 350, CA; *Re Davies' Trusts* (1914) 59 Sol Jo 234 (where the fund was claimed by two women, both of whom claimed to answer the description of 'the wife of the testator'); *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073. Payment into court is justified where a beneficiary has incumbered his interest in the trust property and there is a question as to the amount due to the incumbrancer: *Hockey v Western* supra.

2 *Re Cawthorne* (1849) 12 Beav 56; *Re Upfull's Trust* (1851) 3 Mac & G 281; *Re Biddulph's Trusts*, *Re Poole's Trusts* (1852) 5 De G & Sm 469; *Re Irby* (1853) 17 Beav 334; *Re Jones* (1857) 3 Drew 679; *Re Coulson's Trust* (1857) 4 Jur NS 6; *Re Beauclerk* (1862) 11 WR 203; *Re Richards* (1869) LR 8 Eq 119; *Re Parker's Will* (1888) 58 LJ Ch 23, CA; *Re Salaman, De Pass v Sonnenthal* [1907] 2 Ch 46 at 51 (revsd on another point [1908] 1 Ch 4, CA); *Re Salomons, Public Trustee v Wortley* [1920] 1 Ch 290; *Boyle v Collins* [2004] EWHC 271 (Ch), [2004] 2 BCLC 471.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iii) Payment into Court by Trustees/919. Costs where payment is unjustifiable.

### **919. Costs where payment is unjustifiable.**

If a trustee lodges in court a trust fund where the persons entitled to it can be clearly ascertained, he may be refused his costs in connection with it and may be ordered to pay the costs of proceedings for obtaining a payment of the fund out of court<sup>1</sup>. Difficulties may be referred to the court<sup>2</sup>.

<sup>1</sup> *Re Fagg's Trust* (1850) 19 LJ Ch 175; *Re Lane's Trust* (1854) 3 WR 134; *Re Heming's Trust* (1856) 3 K & J 40; *Re Woodburn's Will* (1957) 1 De G & J 333; *Re Bendyshe* (1857) 3 Jur NS 727 at 728 per Kindersley V-C; *Re Knight's Trusts* (1859) 27 Beav 45; *Re Foligno's Mortgage* (1863) 32 Beav 131; *Re Leake's Trusts* (1863) 32 Beav 135; *Re Pearson's Trusts* (1869) 17 WR 365; *Re Wise's Trusts* (1869) IR 3 Eq 599; *Re Cull's Trusts* (1875) LR 20 Eq 561 at 564 per Jessel MR. The mere threat of proceedings or an unfounded claim made on a trust fund does not justify its being paid into court: *Re Waring* (1852) 16 Jur 652; *Re Maclean's Trusts* (1874) LR 19 Eq 274 at 282 per Jessel MR. A trustee may not pay money into court merely to get rid of the liability of a trust which he has undertaken to perform (*Re Knight's Trusts* supra at 49 per Romilly MR; *Re Elliot's Trusts* (1873) LR 15 Eq 194), or because he cannot get a release from trustees who are entitled to receive it from him (*Re Cater's Trusts (No 2)* (1858) 25 Beav 366) or a release from the persons beneficially interested when there are executors who have a legal right to receive the money (*Re Hoskin's Trusts* (1877) 5 ChD 229), or because, being an executor, he cannot get a release and indemnity, but only a receipt (*Re Roberts' Trusts* (1869) 38 LJ Ch 708; *Re Fortune's Trusts, ex p Brennan* (1870) IR 4 Eq 351). See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 467.

<sup>2</sup> As to the determination of questions by the court see CPR 64; and PARAS 1057, 1070 post. Trustees who pay money into court when a question could be decided under what is now CPR 64.2 are not allowed the costs occasioned by such payment into court: *Re Giles* (1886) 55 LJ Ch 695. In *Re Birkett* (1878) 9 ChD 576 at 581, Jessell MR said that, when there is a difficulty in determining how a legacy is to be applied, there is no justification for payment into court and the proper course is to take out an administration summons (now a claim); but, if payment is made, then the trustee can only recover his costs from the residuary estate. See, however, *Re Parker's Will* (1888) 39 ChD 303 at 305, CA, per Cotton LJ (where it was held that the court has no jurisdiction to order repayment by the trustees of costs deducted by them from the fund before payment in, and that in the circumstances of the case a summons would not necessarily have been a cheaper course of action so that payment in was not unreasonable or improper). The institution of interpleader proceedings is another alternative, although the disputed sum may be ordered to be paid into court, as for example in *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iii) Payment into Court by Trustees/920. Procedure for payment into court.

## 920. Procedure for payment into court.

A trustee wishing to make a payment into court<sup>1</sup> must file a witness statement or affidavit<sup>2</sup> setting out:

- 181 (1) a short description of the trust and the instrument creating it or the circumstances in which the trust arose<sup>3</sup>;
- 182 (2) the names of the persons interested in or entitled to the money or securities to be paid into court with their address, so far as known to him<sup>4</sup>;
- 183 (3) a statement that he agrees to answer any inquiries which the court may make or direct relating to the application of the money or securities<sup>5</sup>; and
- 184 (4) his address for service<sup>6</sup>.

If a trustee pays money or securities into court, unless the court orders otherwise, he must immediately serve notice of the payment into court on every person interested in or entitled to the money or securities<sup>7</sup>.

1 le under the Trustee Act 1925 s 63 (as amended): see PARA 917 ante.

2 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.1. Payment into court must be in the manner prescribed by the Court Funds Rules 1987, SI 1987/821 (as amended): see CIVIL PROCEDURE vol 12 (2009) PARA 1550 et seq. The court is either the High Court or the county court. Lodgments into the High Court of amounts of cash or securities of less than £500 will not be accepted by the Accountant General unless the Chief Master so signifies in writing: *Chancery Division Practice Direction* dated 5 December 1975, *Chancery Guide* (2002) PARA 26.47.

3 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.1(1).

4 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.1(2).

5 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.1(3).

6 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.1(4).

7 *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 9.3.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iii) Payment into Court by Trustees/921. Applications with respect to funds in court.

## 921. Applications with respect to funds in court.

Any application relating to money or securities which have been paid into court, other than an application for the payment out of the money or securities<sup>1</sup>, may be made without notice, but the court may direct notice to be served on any person<sup>2</sup>.

The court's permission is required to take the money out of court<sup>3</sup>. Permission may be obtained by making an application which may be made without notice but the court may direct notice to be served on any person<sup>4</sup>. The application notice must state the grounds on which the order for payment out is sought and evidence of any facts on which the applicant relies may also be necessary<sup>5</sup>.

The application should be made by a person who proves his title to the fund<sup>6</sup>. Case law pre-dating the Civil Procedure Rules<sup>7</sup> indicates that the application should be served on such persons as appear from the heading of the account to be entitled to the fund<sup>8</sup>, including in most cases the trustee who lodged the fund in court, and whose duty it is to appear and protect the fund<sup>9</sup>. The trustee need not be served where in his affidavit he has stated that a named person, then a minor, was absolutely entitled to the fund<sup>10</sup>, or where the portion of the fund sought to be paid out has been carried to the separate account of a named person<sup>11</sup>. Where a fund has been lodged in court to the credit of minors as the next of kin of a person then supposed to have died intestate, but afterwards discovered to have left a will, the fund can be ordered to be paid out to the executor on his application<sup>12</sup>.

An order may be made for payment of the income of the fund to a person entitled to it, while the fund itself is retained in court<sup>13</sup>.

1    le an application for money to be invested, or for payment of interest to any person.

2    *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 6.1. Any such application must be made in accordance with CPR Part 23. The court is either the High Court or the county court.

3    *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 4.1.

4    *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 10.2.

5    *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 paras 4.2, 10.1. Any such application must be made in accordance with CPR Pt 23: *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 4.2. The applicant must also comply with *Practice Direction-Offers to Settle and Payments into Court* PD 36 para 8 (see CIVIL PROCEDURE vol 11 (2009) PARA 729 et seq) where it applies: *Practice Direction-Miscellaneous Provisions about Payments into Court* PD 37 para 4.3.

6    A person not named in the trustee's affidavit may apply for payment out: *Re Puttrell's Trusts* (1877) 7 ChD 647; *Pelling v Goddard* (1878) 9 ChD 185. A person entitled to a definite share in the fund may apply, independently of the other beneficiaries, for payment out of that share: *Re Befford's Will* (1853) 21 LTOS 164; *Re Hawke's Trust* (1854) 18 Jur 33; *Winkworth v Winkworth* (1862) 32 Beav 233; *Re Tracey's Trusts* (1872) IR 6 Eq 271. The rule that a trust fund in court will not be ordered to be paid out to a sole trustee, except on the consent of all the beneficiaries, is not inflexible: *Leigh v Pantin* [1914] 2 Ch 701 at 704 per Sargant J. In *Re Barrow's Policy Trusts* [1918] 1 Ch 452, on an application for payment out, the court refused to consider claims which, if they were established by the applicant in administration proceedings, might have given rise to a distribution other than that which prima facie was proper. An applicant may be allowed his costs, even if his claim fails: *Re Birch's Legacy under Bissell's Will* (1856) 2 K & J 369. Cf *Re London and South Western Railway Extension Act, ex p Stevens* (1848) 2 Ph 772 at 774 per Lord Cottenham LC. The fund will be distributed on the

application of the trustee (*Re Cooper's Trusts* (1853) 4 De GM & G 757; *Re Trower's Trust* (1859) 1 LT 54; *Re Partington's Trust* (1861) 3 Giff 378), but he is not generally the proper person to apply, and he runs the risk of not being allowed his full costs of doing so (*Re Cazneau's Legacy under Housman's Will* (1856) 2 K & J 249; *Re Hutchinson's Trusts* (1860) 1 Drew & Sm 27; *Re Poplar and Blackwall Free School* (1878) 8 ChD 543). As to the trustee's costs on applications by beneficiaries for payment out of court see *Re Sutton* (1882) 21 ChD 855; *Re Vardon's Trusts* (1884) 33 WR 297 (on appeal (1885) 31 ChD 275, CA). As to the trustee's affidavit on payment in see PARA 920 ante.

7 As to the need to exercise caution in applying pre-CPR authorities see PARA 908 ante.

8 See *Re Colson's Trust* (1853) 2 WR 111 (where leave was given to serve some only of numerous persons interested). As to unclaimed funds in court see the Court Funds Rules 1987, SI 1987/821, Pt X (rr 57-62) (as amended). Where a person appeared and unreasonably opposed the application for payment out, he was ordered to pay the costs of the proceedings: *Re Armston's Trusts* (1864) 4 De GJ & Sm 454.

9 *Re Cawthorne* (1849) 12 Beav 56; *Lowe v Moore* (1906) 22 TLR 640.

10 *Re Beauclerk* (1862) 11 WR 203.

11 *Re Young (a lunatic)* (1857) 5 WR 400.

12 *Re Hood's Trusts* [1896] 1 Ch 270.

13 *Re Leake's Trusts* (1863) 32 Beav 135; *Re Gordon's Trusts* (1868) LR 6 Eq 335; *Re Whitton's Trusts* (1869) LR 8 Eq 352; *Re Smith's Trusts* (1870) LR 9 Eq 374; *Re Munton's Trusts* (1870) 39 LJ Ch 764; *Re Evans' Trusts* (1872) 7 Ch App 609; *Re Battell's Trusts* (1872) 21 WR 138. Where the person entitled to the fund was deaf, dumb and blind, the fund was retained in court and the income was ordered to be paid for the person's benefit: *Re Biddulph's Trusts*, *Re Poole's Trusts* (1852) 5 De G & Sm 469.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iii) Payment into Court by Trustees/922. Effect of payment into court.

## 922. Effect of payment into court.

Payment into court by a trustee does not discharge him from his office<sup>1</sup>, or relieve him from liability to account for trust money misapplied or not applied by him<sup>2</sup>, or from liability to be sued in respect of any other breach of trust<sup>3</sup>. He thereby expresses a desire to be discharged within the meaning of a power authorising the appointment of a new trustee in that event<sup>4</sup>; and he is no longer able to exercise any powers or discretions previously vested in him over or in reference to the trust property<sup>5</sup>.

1 *Thompson v Tomkins* (1862) 2 Drew & Sm 8 at 21-22; *Barker v Peile* (1865) 2 Drew & Sm 340 at 342 per Kindersley V-C. Notice of any dealing with an interest in the fund in court should be given to him as a trustee of the fund: *Thompson v Tomkins* supra.

2 *Goode v West* (1851) 9 Hare 378; *Beaty v Curson* (1868) LR 7 Eq 194.

3 *Re Waring* (1852) 16 Jur 652; *Thorp v Thorp* (1855) 1 K & J 438; *A-G v Alford* (1855) 4 De GM & G 843. He is, however, relieved as against claimants on the fund: *Re Jephson* (1859) 1 LT 5.

4 *Re Bailey's Trust* (1854) 3 WR 31; *Re Williams' Settlement* (1858) 4 K & J 87.

5 *Re Coe's Trust* (1858) 4 K & J 199; *Re Tegg's Trusts* (1866) 15 WR 52; *Re Poplar and Blackwall Free School* (1878) 8 ChD 543; *Re Mulqueen's Trusts, ex p Mulqueen* (1881) 7 LR Ir 127; *Re Ashburnham's Trust* (1885) 54 LT 84, DC; *Re Nettlefold's Trusts* (1888) 59 LT 315. See, however, *Re Landon's Trusts* (1871) 40 LJ Ch 370, which was dissented from in *Re Murphy's Trusts* [1900] 1 IR 145. Where, under the terms of the trust, trustees had a discretion as to the mode of applying the capital and income of the trust fund for the benefit of the beneficiary, it was held that payment of the fund into court put an end to their discretion, but that the court could deal with the fund in the way that it considered best in his interest; and on his application the fund was ordered to be paid out to the trustees of a proper settlement executed by him: *Re Murphy's Trusts* supra.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iv) Retainer and Set-off/923. Retainer as against beneficiaries.

#### (iv) Retainer and Set-off

#### 923. Retainer as against beneficiaries.

Trustees may retain the capital or income of trust property as against a beneficiary entitled to it who owes money to them as trustees of the trust<sup>1</sup>, and as against persons claiming through him<sup>2</sup>.

A beneficiary who is indebted to the trust estate<sup>3</sup>, or has received from it more than his due share<sup>4</sup>, or has rendered himself liable in respect of a breach of trust<sup>5</sup>, may claim nothing from the trust estate until his liability to it is made good. A trustee beneficiary liable to pay a sum to the trust fund should not, however, be ordered to make good that part of it which would come to him as a beneficiary on the distribution of the fund, although this principle should only be applied after deducting the costs and expenses relating to the litigation which fall on the fund<sup>6</sup>.

The trustees may not retain money which comes into their hands as trustees incidentally and not as part of the trust property<sup>7</sup>. A trustee of two funds under independent trusts for the same beneficiary may not retain out of one of them in order to satisfy a claim which he has against the beneficiary in respect of the other fund<sup>8</sup>.

1 *Priddy v Rose* (1817) 3 Mer 86; *Smith v Smith* (1835) 1 Y & C Ex 338; *Weston, Davies v Tagart*[1900] 2 Ch 164. This right exists not only where there is a legal debt presently payable, but also where the trustees have a claim against the beneficiary sounding in damages (eg for breach of covenant to pay the premiums on a settled policy of insurance): *Re Jewell's Settlement, Watts v Public Trustee*[1919] 2 Ch 161 at 174-177 per Younger J. Where, however, an annuitant under a deed of covenant is overpaid (eg by failure to deduct income tax from the annuity) owing to a mistake of law and subsequently becomes beneficially entitled to a share in the estate of the covenantor, the trustees of that estate are not entitled to retain out of that share the amount of such overpayments: *Re Hatch, Hatch v Hatch*[1919] 1 Ch 351 at 356-357 per Sargant J.

2 *Ex p Mitford* (1784) 1 Bro CC 398; *Woodyatt v Gresley* (1836) 8 Sim 180; *Burridge v Row* (1842) 1 Y & C Ch Cas 183 (affd (1844) 13 LJ Ch 173); *Corr v Corr* (1879) 3 LR Ir 435, Ir CA; *Hallett v Hallett* (1879) 13 ChD 232 at 234 per Fry J; *Re Weston, Davies v Tagart*[1900] 2 Ch 164.

3 *Priddy v Rose* (1817) 3 Mer 86; *Smith v Smith* (1835) 1 Y & C Ex 338; *Woodyatt v Gresley* (1836) 8 Sim 180; *Willes v Greenhill* (1860) 29 Beav 376; *Vaughton v Noble* (1861) 30 Beav 34 at 38-39; *Corr v Corr* (1879) 3 LR Ir 435, Ir CA; *Re Harrauld, Wilde v Walford* (1884) 53 LJ Ch 505, CA; *Re Milnes, Milnes v Sherwin* (1885) 53 LT 534; *Re Akerman, Akerman v Akerman*[1891] 3 Ch 212; *Re Taylor, Taylor v Wade*[1894] 1 Ch 671; *Re Weston, Davies v Tagart* [1900] 2 Ch 164; *Re Wheeler, Hankinson v Hayter*[1904] 2 Ch 66 at 71 per Warrington J; *Re Rhodesia Goldfields Ltd, Partridge v Rhodesia Goldfields Ltd* [1910] 1 Ch 239; *Re Towndrow, Gratton v Machen*[1911] 1 Ch 662; *Re Melton, Milk v Towers*[1918] 1 Ch 37, CA (overruling *Re Binns, Lee v Binns*[1896] 2 Ch 584). See also EQUITY vol 16(2) (Reissue) PARA 903. The share of a beneficiary under a will is not liable to be retained to meet a debt due from another testator's estate of which he is executor (*Re Bruce, Lawford v Bruce*[1908] 2 Ch 682, CA), nor to meet a debt owing to a firm in which the testator was a partner (*Jackson v Yeats*[1912] 1 IR 267). As to the liability of a beneficiary on overpayment see PARA 1133 post.

4 *Downes v Bullock* (1858) 25 Beav 54 at 62 per Romilly MR; affd sub nom *Bullock v Downes* (1860) 9 HL Cas 1.

5 *Parnell v Hingston* (1856) 3 Sm & G 337; *Irby v Irby (No 3)* (1858) 25 Beav 632; *Jacobs v Rylance*(1874) LR 17 Eq 341; *Hallett v Hallett*(1879) 13 ChD 232; *Re Brown, Dixon v Brown*(1886) 32 ChD 597; *Doering v Doering*(1889) 42 ChD 203; *Re Eyton, Bartlett v Charles*(1890) 45 ChD 458; *Re Dacre, Whitaker v Dacre* [1916] 1 Ch 344, CA. It makes no difference that his interest in the trust estate is derivative (*Jacobs v Rylance* supra; *Doering v Doering* supra), and the principal applies in the case of the assign of a beneficiary who is also a trustee and has committed a breach of trust (*Morris v Livie* (1842) 1 Y & C Ch Cas 380). It does not, however, apply where the breach of trust is committed in respect of another fund (*Re Towndrow, Gratton v Machen*[1911]

1 Ch 662), and circumstances may exempt incumbrancers of the beneficiary's share from the application of the principle (*Re Eyton*, *Bartlett v Charles* supra).

6 *Selangor United Rubber Estates Ltd v Cradock (No 4)*[1969] 3 All ER 965, [1969] 1 WLR 1773, restricting the scope of the principle in *Re VGM Holdings Ltd*[1942] Ch 235, [1942] 1 All ER 224, CA.

7 *Hallett v Hallett* (1879) 13 ChD 232.

8 *Price v Loaden* (1856) 21 Beav 508; *Palaiet v Carew* (1863) 32 Beav 564.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(iv) Retainer and Set-off/924. Set-off.

#### **924. Set-off.**

A trustee is ordinarily entitled to set off an amount due to him from the trust estate against an amount due to it from him; and he may set off an amount due to the estate from a beneficiary against a sum payable out of the estate to the beneficiary<sup>1</sup>.

Where a trustee sues a debtor to the trust estate, the debtor may set off against the trustee's claim an amount due to him from a beneficiary entitled to trust property; and a person who is sued for debt may set off a sum due from the claimant to a trustee for him<sup>2</sup>.

1 As to a set-off between the trustee and the trust estate see CIVIL PROCEDURE vol 11 (2009) PARA 693. There is no right to set off a gain against a loss in respect of different breaches of trust: see PARA 1102 post.

2 As to a set-off between the trustee and the debtors to the trust estate see CIVIL PROCEDURE vol 11 (2009) PARA 694.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(5) RIGHTS OF TRUSTEES/(v) Discharge on Termination of Trust/925. Trustee's right to release.

## **(v) Discharge on Termination of Trust**

### **925. Trustee's right to release.**

Where there is an instrument declaring a clearly defined trust, and the trustee pays the income or transfers the capital of the trust property in strict accordance with the trust, he may on the termination of the trust require an acknowledgement that the accounts are settled<sup>1</sup>, but he has no right to require a release by deed<sup>2</sup>. Where, however, there is merely an oral trust, and no evidence as to its exact terms or as to the amount of the trust property, or where the trustee is required to deal with the property in a manner differing from the strict tenor of the trust, he can legally demand a release by deed<sup>3</sup>. Where a beneficiary has settled his share of the trust property, the trustee is entitled to a release from him, but can only require a receipt from the trustees to whom it is to be transferred<sup>4</sup>.

1 *Chadwick v Heatley* (1845) 2 Coll 137; *Re Wright's Trusts* (1857) 3 K & J 419. If such an acknowledgement is refused, he may insist on the account being taken by the court: *Chadwick v Heatley* supra. An executor who has acted competently in the administration and charged reasonably is entitled to have his accounts approved and to be discharged from the administration: *Glenister v Moody* [2003] EWHC 3155 (Ch), [2003] All ER (D) 242 (Nov).

2 *King v Mullins* (1852) 1 Drew 308 at 311 per Kindersley V-C; *Warter v Anderson* (1853) 11 Hare 301 at 303 per Wood V-C. A trustee is not in all cases entitled to a formal deed of release; in many cases a receipt from the beneficiary is a sufficient discharge: *Re Robert's Trusts* (1869) 38 LJ Ch 708 at 709 per Malins V-C. The desire for a release on the part of trustees is not encouraged: a receipt from a person entitled to money is the best release for the payment of it (*Re Hoskin's Trusts* (1877) 5 ChD 229 at 234 per Malins V-C), and no more may be required where executors or trustees are the persons entitled to receive trust money (*Re Cater's Trusts (No 2)* (1858) 25 Beav 366 at 367 per Romilly MR; *Re Hoskin's Trusts* supra). Where a bank renounced probate and asked for a formal release before handing over to the administrators the documents relating to the estate in its possession, it was held not entitled to such a release: *Tiger v Barclays Bank Ltd* [1951] 2 KB 556, [1951] 2 All ER 262; affd on a different point [1952] 1 All ER 85, CA.

3 *King v Mullins* (1852) 1 Drew 308 at 311. As to releases in respect of breaches of trust see PARA 1120 et seq post; and as to releases generally see CONTRACT vol 9(1) (Reissue) PARAS 1052-1054. As to setting aside a release executed under a mistake see MISTAKE vol 77 (2010) PARA 52 et seq.

4 *Re Cater's Trusts (No 2)* (1858) 25 Beav 366 at 367 per Romilly MR; *Tiger v Barclays Bank Ltd* [1951] 2 KB 556, [1951] 2 All ER 262 (affd on a different point [1952] 1 All ER 85, CA).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(i) In general/926. Misuse of trustee's position.

## **(6) DISABILITIES OF TRUSTEES**

### **(i) In general**

#### **926. Misuse of trustee's position.**

A trustee must not in any way make use of the trust property or of his position as trustee for his own interest or private advantage<sup>1</sup>. A person who accepts a trust to sell or otherwise deal with or manage property for another undertakes, on becoming trustee, so long as he occupies that position, not to sell, deal with or manage the property for his own benefit and advantage<sup>2</sup>. It is a breach of trust for a trustee to make an advance out of the trust fund to a beneficiary, under a power for that purpose, in order to enable the beneficiary to repay a debt due to himself<sup>3</sup>. He may, however, accept repayment out of an advance of trust money to his debtor if it was not made with that distinct object<sup>4</sup>.

1 *Webb v Earl of Shaftesbury, Earl of Shaftesbury v Arrowsmith* (1802) 7 Ves 480 at 487-488; *Ex p James* (1803) 8 Ves 337; *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544, HL; *Re Imperial Land Co of Marseilles, ex p Larking* (1877) 4 ChD 566 at 578, CA, per Malins V-C; *Re Francis, Barrett v Fisher* (1905) 74 LJ Ch 198; *Bath v Standard Land Co Ltd* [1911] 1 Ch 618 at 637, CA, per Fletcher Moulton LJ; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL. As to the application of the principles in relation to constructive trusts see PARA 695 et seq ante. Unless expressly authorised to do so, a person in a fiduciary position is not entitled to make a profit out of his position: *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell. See PARA 928 post. Where a bribe is paid to a trustee to induce him to sell or let trust property, the sale or lease will be voidable and he will be accountable as a constructive trustee for the bribe, or, alternatively, he may be liable to account for the actual loss sustained: *T Mahesan s/o Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC; *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119, [2005] 4 All ER 73; and see PARA 697 ante.

2 *Ex p Lacey* (1802) 6 Ves 625 at 626 per Lord Eldon LC.

3 *Molyneux v Fletcher* [1898] 1 QB 648. As to the power to lend to a beneficiary on personal security see PARA 1010 post.

4 *Butler v Butler* (1877) 7 ChD 116, CA; *Chillingworth v Chambers* [1896] 1 Ch 685, CA. A trustee-solicitor may demand and receive from a third person to whom he lends trust money the costs of preparing the mortgage by which it is secured: *Whitney v Smith* (1869) 4 Ch App 513. A trustee is not liable to account for money received from an outside source without his volition: *Re Northcote's Will Trusts, Northcote v Northcote* [1949] 1 All ER 442 (where executors who were obliged to obtain a grant of probate abroad in respect of foreign assets were held not accountable for agency commission allowed by the foreign law).

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## **927. Avoidance of conflict between trustee's interest and duty.**

A trustee must not intentionally place himself in a position in which his interest may conflict with his duty<sup>1</sup>. Therefore he must not enter into engagements in which he has or can have a personal interest which conflicts or possibly may conflict with the interests of those whom he is bound to protect<sup>2</sup>. No act of the trustee can restrict or prejudice the title of his beneficiaries<sup>3</sup>.

1 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 442, CA, per Rigby LJ; *Boardman v Phipps* [1967] 2 AC 46 at 123, [1966] 3 All ER 721 at 756, HL, per Lord Upjohn. A person in a fiduciary position is not allowed to put himself in a position where his interest and duty conflict: *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378, HL; *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL. The rule does not apply, however, where the trustee has been put in that position by the testator or settlor under whose disposition his trust arose: *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA. See also PARA 697 ante. The fact that a trustee may have conflicting duties does not release him from either duty: see *Moody v Cox and Hatt* [1917] 2 Ch 71, CA (where a solicitor who had put himself in the position of owing a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other by selling as trustee and acting for both vendor and purchaser on the sale was held not entitled to say that he had discharged his duty to his client because he owed a conflicting duty to the beneficiaries).

2 *Richardson v Chapman* (1760) 7 Bro Parl Cas 318, HL; *Phayre v Peree* (1815) 3 Dow 116 at 128, HL, per Lord Redesdale; *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461 at 471, HL, per Lord Cranworth LC; *Shallcross v Oldham* (1862) 2 John & H 609; *Bennett v Gas Light and Coke Co* (1882) 52 LJ Ch 98; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 442, CA, per Rigby LJ; *Costa Rica Rly Co Ltd v Forwood* [1901] 1 Ch 746 at 760-761, CA, per Vaughan Williams LJ; *Re Thomson, Thomson v Allen* [1930] 1 Ch 203 (where *Aberdeen Rly Co v Blaikie Bros* supra was applied in special circumstances to the case of an executor who, after the testator's death, set up a business competing with that which the testator had bequeathed to him); *Re Wallace Smith & Co Ltd* [1992] BCLC 970. Cf *Re Clark, Clark v Moore* (1920) 150 LT Jo 94 (lease and sale of trust property to company promoted and controlled by trustee). Although the existence of the fiduciary relationship creates an inability in the trustee to contract in regard to the trust property, when the contract has been brought into existence before the fiduciary relationship the trustee is not precluded from asserting his rights under the pre-existing contract: *Re Mullholland's Will Trusts, Bryan v Westminster Bank Ltd* [1949] 1 All ER 460 (where a testator demised premises with an option to purchase and later executed a will appointing the lessees executors, and the option was held exercisable after the testator's death). As to the disqualification of a trustee from purchasing trust property see PARAS 938-943 post.

3 *Brydges v Brydges, Philips v Brydges* (1796) 3 Ves 120 at 127 per Arden MR; *Selby v Alston* (1797) 3 Ves 339 at 341; *Blennerhassett v Day* (1812) 2 Ball & B 104. As to the protection of trust property from execution levied in respect of a debt of the trustee see CIVIL PROCEDURE vol 12 (2009) PARA 1326. As to the effect on trust property of the trustee's bankruptcy see PARA 733 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(i) In general/928. Trustee's accountability for profit made out of his trust.

## 928. Trustee's accountability for profit made out of his trust.

It is a general principle that, unless otherwise expressly provided<sup>1</sup>, a trustee is accountable for any profit that he makes out of his trust<sup>2</sup>. Moreover, the liability to account for a profit is not confined to cases where the profit is derived directly from the trust estate<sup>3</sup>. A trustee may also be held to be a constructive trustee of the profit<sup>4</sup>.

1 A bank as executor was held on the construction of its charging clause to be under no duty to account for the profit gained by its employment of money deposited with it: *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054. Where a testator empowered his trustees to procure their appointment as directors of a company in his place, they were held entitled to retain the remuneration paid to them: *Re Llewellyn's Will Trusts, Griffiths v Wilcox* [1949] Ch 225, [1949] 1 All ER 487.

2 *Bray v Ford* [1896] AC 44 at 51, HL, per Lord Herschell; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378 at 391, HL (where Lord Macmillan cited 2 Kame's Principles of Equity (3rd Edn) 87: 'Equity prohibits a trustee from making any profit by his management, directly or indirectly'); *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Guinness plc v Saunders* [1990] 2 AC 663, [1990] 1 All ER 652, HL. As to the extent of the disclosure required to relieve a trustee from liability to account see *Phipps v Boardman* [1965] Ch 992, [1965] 1 All ER 849, CA (affd in *Boardman v Phipps* supra); *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14 per Lord Radcliffe; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131. See also *Swain v The Law Society* [1981] 3 All ER 797, [1982] 1 WLR 17, CA (revsd [1983] 1 AC 598, [1982] 2 All ER 827, HL, on the grounds that The Law Society was not acting as a fiduciary but partly pursuant to a public duty under the Solicitors Act 1974); *Hanson v Lorenz and Jones* [1987] 1 FTLR 23, CA (solicitor under no duty to account for profit from a joint venture between himself and his client). See further EQUITY vol 16(2) (Reissue) PARA 858. Thus a trustee who was a clerk on half commission with a firm of stockbrokers was held bound to account for commission paid on trust business introduced: *Williams v Barton* [1927] 2 Ch 9. The principle applies to any person in a fiduciary position, whether technically a trustee or not: *Re French Protestant Hospital* [1951] Ch 567, [1951] 1 All ER 938 (where a byelaw made by the directors of a charitable corporation permitting them to be paid for professional services was held to be invalid). The principle applies to custodian trustees as well as ordinary trustees: *Re Brooke Bond Co Ltd's Trust Deed, Brooke v Brooke Bond & Co Ltd* [1963] Ch 357, [1963] 1 All ER 454. As to custodian trustees see PARA 792 et seq ante. As to the disability of constructive trustees to retain a profit see PARA 697 ante; and as to the disability of executors to make a profit see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 45. Cf *Nordisk Insulin-laboratorium v Gorgate Products Ltd* [1953] Ch 430, [1953] 1 All ER 986, CA (no fiduciary relationship established).

3 *Re Macadam, Dallow v Codd* [1946] Ch 73, [1945] 2 All ER 664 (where trustees who became directors of a company by exercising a discretionary power under the trust were held accountable to the trust estate for the remuneration received). Where, however, trust shares were not used to procure the appointment of a trustee as director, he was entitled to retain his remuneration: *Re Gee, Wood v Staples* [1948] Ch 284, [1948] 1 All ER 498. A trustee shareholder may use votes attached to his personal shareholding as he wishes. It is not, however, possible to split one's vote on a show of hands: see *McGrattan v McGrattan* [1985] NI 28, NI CA. See also *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443. The Privy Council has, however, taken a less strict line with directors who take advantage of a corporate opportunity which a fully informed board of directors has rejected: see *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 52 ALJR 399, PC.

4 As to bribes to trustees see PARA 697 ante.

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### **929. Bargains between trustee and beneficiary.**

A presumption of undue influence arises in the case of a bargain between a trustee and beneficiary concerning the trust property<sup>1</sup>. Such a bargain will, however, be upheld if it can be shown that the trustee has made full and frank disclosure of all the relevant facts so that the beneficiary was fully aware of all the circumstances of the transaction and had not been subjected to pressure or any undue influence<sup>2</sup>.

1 As to this presumption see EQUITY vol 16(2) (Reissue) PARAS 417, 419 et seq, 426; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

2 As to bargains with beneficiaries see PARA 944 post.

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## (ii) Disability to receive Remuneration

### 930. Trustee's general disentitlement to remuneration.

The basic rule is that a trustee is under a duty to act without remuneration<sup>1</sup>: he is not entitled to a salary<sup>2</sup> or to compensation for personal trouble and loss of time<sup>3</sup>. However, in practice, a trustee will in most cases be able to bring himself within one of the exceptions to the rule. He may be entitled under an express or implied direction in the instrument creating the trust<sup>4</sup> or an express order of court<sup>5</sup>, or by virtue of an express stipulation on the subject which he has made with a beneficiary before he accepted the trust<sup>6</sup>, or where the trust property is in a country in which he is allowed remuneration by the local law<sup>7</sup>. Further, there are statutory provisions under which a judicial trustee<sup>8</sup>, the Public Trustee<sup>9</sup> or a trust corporation appointed by the court<sup>10</sup> may be entitled to remuneration, and there are provisions under the Trustee Act 2000 in relation to professional trustees<sup>11</sup>.

Where it is by virtue of his position as trustee that a trustee has acquired the position in respect of which he drew the remuneration that he has received, he is not entitled to retain the remuneration<sup>12</sup>. He is, however, entitled to retain remuneration received by virtue of an independent bargain with the firm employing him, and not by virtue of the use of his position as a trustee<sup>13</sup>.

1 See *Robinson v Pett* (1734) 3 P Wms 249 at 251.

2 *Taylor v Taylor* (1843) 4 Dr & War 124; *Re Bedingfield, Bedingfield v D'Eye* (1887) 57 LT 332.

3 *How v Godfrey and White* (1678) Cas temp Finch 361; *Bonithon v Hockmore* (1685) 1 Vern 316; *Robinson v Pett* (1734) 3 P Wms 249; *Re Ormsby* (1809) 1 Ball & B 189 at 190; *Pince v Beattie* (1863) 9 Jur NS 1119; *Barrett v Hartley* (1866) LR 2 Eq 789 at 796; *Re Accles Ltd, Hodgson v Accles Ltd* [1902] WN 164. Cf *D'Arcy v O'Kelly* (1921) 55 ILT 48. The fact that the trustee has benefited the trust property to the prejudice of his own affairs cannot be taken into consideration: *Robinson v Pett* supra. He may not charge or take a commission or other remuneration for performing any duty in connection with the trust unless he is specially authorised to do so: *Arnold v Garner* (1847) 2 Ph 231 at 235 per Lord Cottenham LC; *Nicholson v Tutin (No 2)* (1857) 3 K & J 159. As to a trustee who is an auctioneer see *Matthison v Clarke* (1854) 3 Drew 3; *Douglas v Archbutt* (1858) 2 De G & J 148; and AUCTION vol 2(3) (Reissue) PARA 223. A trustee cannot demand remuneration for past services as a condition of continuing in office: *Foster v Spencer* [1996] 2 All ER 672. As to the right of a constructive trustee to remuneration in some cases see PARA 937 post.

4 *Ellison v Airey* (1748) 1 Ves Sen 111 at 115 per Lord Eldon LC; *Webb v Earl of Shaftesbury, Earl of Shaftesbury v Arrowsmith* (1802) 7 Ves 480; *Willis v Kibble* (1839) 1 Beav 559; *Re Sherwood* (1840) 3 Beav 338; *Re Thorley, Thorley v Massam* [1891] 2 Ch 613, CA; *Jobson v Palmer* [1893] 1 Ch 71. Where there is a direction as to remuneration in the trust instrument a trustee who acts in breach of trust does not disentitle himself from charging any fees for work properly done: *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] WTLR 387, [2003] All ER (D) 309 (Jan). Trusteeship is an office, and, where the instrument creating the trust provides for a trustee to be remunerated, it is an office of profit for tax purposes: *Dale v IRC* [1954] AC 11, [1953] 2 All ER 671, HL. As to professional trustees see the Trustee Act 2000 ss 28(4), 33(2); and PARA 931 post. As to taxation see further INCOME TAXATION. As to the remuneration of trustees for debenture holders see *Re Piccadilly Hotel Ltd, Paul v Piccadilly Hotel Ltd* [1911] 2 Ch 534; *Re Locke and Smith Ltd, Wigan v Locke and Smith Ltd* [1914] 1 Ch 687, CA.

5 *Brocksopp v Barnes* (1820) 5 Madd 90 at 90-91 per Leach V-C; *Marshall v Holloway* (1820) 2 Swan 432 at 453-454; *Bainbrigg v Blair* (1845) 8 Beav 588 at 596-597 per Lord Langdale MR; *Re Freeman's Settlement Trusts* (1887) 37 ChD 148; *Re Bignell, Bignell v Chapman* [1892] 1 Ch 59, CA; *Re Masters, Coutts & Co v Masters* [1953] 1 All ER 19, [1953] 1 WLR 81; *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526. The court will only allow a trustee remuneration in exceptional cases (*Re Worthington, ex p*

*Leighton v Macleod* supra), for example where his duties have proved unexpectedly onerous (see *Re Duke of Norfolk's Settlement Trusts*, *Earl of Perth v Fitzalan-Howard*[1982] Ch 61, [1981] 3 All ER 220, CA; *Foster v Spencer*[1996] 2 All ER 672).

6 *Ayliffe v Murray* (1740) 2 Atk 58 at 59-60 per Lord Hardwicke LC; *Re Accles Ltd*, *Hodgson v Accles Ltd* [1902] WN 164. If, before accepting the office, a trustee openly tells a beneficiary that he will not act unless the beneficiary will give him a remuneration not contemplated by the terms of the trust, and the beneficiary contracts that he is to have it, the transaction may be upheld: *Ayliffe v Murray* supra. A trustee who has accepted the office without any stipulation on the subject cannot afterwards refuse to continue to act unless he is remunerated, even though, by performing his duties, he has greatly benefited the beneficiaries: *Bainbrigge v Blair* (1845) 8 Beav 588 at 596; *Barrett v Hartley*(1866) LR 2 Eq 789 at 796 per Stuart V-C.

7 *Chambers v Goldwin* (1804) 9 Ves 254 at 267 et seq.

8 See PARA 764 ante.

9 See PARAS 790-791 ante.

10 See PARA 801 ante.

11 See PARA 931 post.

12 *Re Macadam*, *Dallow v Codd*[1946] Ch 73, [1945] 2 All ER 664 (where trustees who became directors of a company by exercising a discretionary power under the trust were held accountable to the trust estate for the remuneration received); *Re Keeler's Settlement Trusts*, *Keeler v Gledhill*[1981] Ch 156, [1981] 1 All ER 888 (although this is no longer authoritative as to future fees, owing to *Re Duke of Norfolk's Settlement Trusts*, *Earl of Perth v Fitzalan-Howard*[1982] Ch 61, [1981] 3 All ER 220, CA).

13 *Re Lewis*, *Lewis v Lewis* (1910) 103 LT 495 (where a person who had acted as salesman for a firm at a salary was appointed by his father's will trustee of a share in the firm and was held entitled to retain the salary in addition to certain remuneration which he obtained under the will for acting as managing partner); *Re Gee*, *Wood v Staples*[1948] Ch 284, [1948] 1 All ER 498 (cited in PARA 928 note 3 ante). A director of a company who holds his qualification shares as trustee for another company is not accountable to that company for his director's fees: *Re Dover Coalfield Extension Ltd*[1908] 1 Ch 65, CA.

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### **931. Remuneration of professional trustee under the Trustee Act 2000 where there is an express charging clause in the trust instrument.**

Where there is a provision in the trust instrument<sup>1</sup> entitling a trustee to receive payment out of the trust funds<sup>2</sup> in respect of services provided by him to or on behalf of the trust<sup>3</sup> and the trustee is a trust corporation<sup>4</sup> or is acting in a professional capacity<sup>5</sup>, the trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee<sup>6</sup>. Any payments to which the trustee is entitled in respect of services are to be treated<sup>7</sup> as remuneration for services and not as a gift<sup>8</sup>.

These provisions substantially amend the common law rules relating to remuneration<sup>9</sup>.

1 For the purposes of the Trustee Act 2000, an enactment or a provision of subordinate legislation is not to be regarded as being, or as being part of, a trust instrument: s 6(2). For the meanings of 'enactment' and 'subordinate legislation' see PARA 903 note 2 ante.

2 For the meaning of 'trust funds' see PARA 902 note 1 ante.

3 Trustee Act 2000 s 28(1)(a). Section 28 applies in relation to services provided to or on behalf of, or expenses incurred (on or after its commencement (ie 1 February 2001)) on behalf of, trusts whenever created: s 33(1). It seems that the phrase 'on or after its commencement' applies only to expenses.

4 For the meaning of 'trust corporation' see PARA 798 ante; definition applied by ibid s 39(1).

5 Ibid s 28(1)(b). For these purposes, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with:

3 (1) the management or administration of trusts generally or a particular kind of trust; or

4 (2) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description: ss 28(5), 39(2).

6 Ibid s 28(2). For these purposes, a person acts as a lay trustee if he is not a trust corporation and does not act in a professional capacity: ss 28(6), 39(2). The provisions of s 28(2)-(4) apply to a trustee except to the extent (if any) to which the trust instrument makes inconsistent provision: see s 28(1). Section 28(2) applies to a trustee of a charitable trust who is not a trust corporation only if he is not a sole trustee, and to the extent that a majority of the other trustees have agreed that it should apply to him: s 28(3). 'Charitable trust' means a trust under which property is held for charitable purposes; and 'charitable purposes' has the same meaning as in the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 2): Trustee Act 2000 s 39(1).

7 Ie for the purposes of the Wills Act 1837 s 15 (as amended) (gifts to an attesting witness to be void: see WILLS vol 50 (2005 Reissue) PARAS 343, 370) and of the Administration of Estates Act 1925 s 34(3) (order in which estate to be paid out: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 410 et seq). Nothing in the Trustee Act 2000 s 28 is to be treated as affecting the operation of the Wills Act 1837 s 15 (as amended) or the Administration of Estates Act 1925 s 34(3) in relation to any death occurring before the commencement of the Trustee Act 2000 s 28 (ie 1 February 2001): s 33(2).

8 Ibid s 28(4).

9 As to the common law rules relating to remuneration see PARAS 934-935 post.





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### **932. Remuneration of professional trustee under the Trustee Act 2000 where there is no express provision in the trust instrument.**

Where there is no provision about the entitlement of a trustee to remuneration made by the trust instrument<sup>1</sup> or by any enactment or any provision of subordinate legislation<sup>2</sup>, a trustee who is a trust corporation<sup>3</sup>, but is not a trustee of a charitable trust<sup>4</sup>, is entitled to receive reasonable remuneration<sup>5</sup> out of the trust funds<sup>6</sup> for any services that the trust corporation provides to or on behalf of the trust<sup>7</sup>.

A trustee who acts in a professional capacity<sup>8</sup>, but who is not a trust corporation, a trustee of a charitable trust or a sole trustee is likewise entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust, if each of the other trustees has agreed in writing that he may be remunerated for the services<sup>9</sup>.

A trustee is entitled to remuneration under these provisions even if the services in question are capable of being provided by a lay trustee<sup>10</sup>.

These provisions apply to a trustee who has been authorised<sup>11</sup> to exercise functions<sup>12</sup> as an agent of the trustees, or to act as a nominee or custodian<sup>13</sup>, as they apply to any other trustee<sup>14</sup>.

1 Trustee Act 2000 s 29(5)(a). As to the meaning of 'trust instrument' see PARA 931 note 2 ante.

2 Ibid s 29(5)(b). For the meanings of 'enactment' and 'subordinate legislation' see PARA 903 note 2 ante.

3 For the meaning of 'trust corporation' see PARA 798 ante; definition applied by ibid s 39(1).

4 For the meaning of 'charitable trust' see PARA 931 note 7 ante. As to the remuneration of trustees of charitable trusts see PARA 933 post.

5 'Reasonable remuneration' means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of the trust by that trustee; and for the purposes of the Trustee Act 2000 s 29(1) includes, in relation to the provision of services by a trustee who is an authorised institution under the Banking Act 1987 and provides the services in that capacity, the institution's reasonable charges for the provision of such services: Trustee Act 2000 s 29(3).

6 For the meaning of 'trust funds' see PARA 902 note 1 ante.

7 Trustee Act 2000 s 29(1). Section 29 applies in relation to services provided to or on behalf of, or expenses incurred (on or after its commencement (ie 1 February 2001)) on behalf of, trusts whenever created: s 33(1). It seems that the phrase 'on or after its commencement' applies only to expenses. Nothing in s 29 is to be treated as affecting the operation of the Wills Act 1837 s 15 (as amended) (see WILLS vol 50 (2005 Reissue) PARAS 343, 370) or the Administration of Estates Act 1925 s 34(3) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 410 et seq) in relation to any death occurring before the commencement of the Trustee Act 2000 s 29 (ie 1 February 2001): s 33(2).

8 As to a trustee acting in a professional capacity see PARA 931 note 5 ante.

9 Trustee Act 2000 s 29(2).

10 Ibid s 29(4). For the meaning of 'lay trustee' see PARA 931 note 6 ante.

11 Ie under a power conferred by ibid Pt IV (ss 11-27) (see PARA 988 et seq post) or the trust instrument.

- 12 For the meaning of 'functions' see PARA 903 note 1 ante.
- 13 For the meaning of 'custodian' see PARA 991 note 4 post.
- 14 Trustee Act 2000 s 29(6). As to the remuneration of agents, nominees and custodians see PARA 933 post.

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### **933. Remuneration of trustees of charitable trusts under the Trustee Act 2000.**

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> make provision for the remuneration of trustees of charitable trusts<sup>3</sup> who are trust corporations<sup>4</sup> or act in a professional capacity<sup>5</sup>. This power includes power to make provision for the remuneration of a trustee who has been authorised<sup>6</sup> to exercise functions<sup>7</sup> as an agent of the trustees or to act as a nominee or custodian<sup>8</sup>.

1 As to the Secretary of State see PARA 794 note 36 ante.

2 Regulations made under the Trustee Act 2000 s 30 may make different provision for different cases, and may contain such supplemental, incidental, consequential and transitional provision as the Secretary of State considers appropriate: s 30(3). The power to make regulations under s 30 is exercisable by statutory instrument, but no such instrument is to be made unless a draft of it has been laid before Parliament and approved by a resolution of each House of Parliament: s 30(4). At the date at which this volume states the law no such regulations had been made.

3 For the meaning of 'charitable trust' see PARA 931 note 6 ante.

4 For the meaning of 'trust corporation' see PARA 798 ante.

5 Trustee Act 2000 s 30(1).

6 ie under a power conferred by *ibid* Pt IV (ss 11-27) (see PARA 988 et seq post) or any other enactment or any provision of subordinate legislation, or by the trust instrument.

7 For the meaning of 'functions' see PARA 903 note 1 ante.

8 Trustee Act 2000 s 30(2). For the meaning of 'custodian' see PARA 885 note 4 post. As to the remuneration of agents, nominees and custodians see PARA 903 post.

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### **934. Position in relation to remuneration where unavailable under Trustee Act 2000.**

Where there is no right to remuneration under the Trustee Act 2000 and there is no express provision for remuneration in the trust instrument<sup>1</sup> a trustee is unable to receive remuneration even where the trustee acts as a solicitor or in some other professional capacity<sup>2</sup>, or where he carries on or transacts a trade or business in connection with and for the benefit of the trust<sup>3</sup>. It extends to the firm of the professional trustee and to his partners individually<sup>4</sup>, unless the trustee arranges that the partner employed is alone to be entitled to the remuneration<sup>5</sup>. The rule also extends to executors and to trustees not holding on an express trust<sup>6</sup>. It does not, however, apply to the costs of a solicitor-trustee acting in legal proceedings for himself and his co-trustees jointly, or for himself and his beneficiaries<sup>7</sup>, or where he acts separately for a person to whom trust money is lent on mortgage<sup>8</sup>, or as between him and a stranger who unsuccessfully brings an adverse claim against the trust<sup>9</sup>.

1 See PARA 930 et seq ante.

2 *New v Jones* (1833) 1 Mac & G 668 note (d); *Moore v Frowd* (1837) 3 My & Cr 45; *Fraser v Palmer* (1841) 4 Y & C Ex 515; *Bainbrigge v Blair* (1845) 8 Beav 588; *Stanes v Parker* (1846) 9 Beav 385 at 389 per Lord Langdale MR; *Todd v Wilson* (1846) 9 Beav 486; *Gomley v Wood* (1846) 3 Jo & Lat 678; *Re Wyche* (1848) 11 Beav 209; *Cradock v Piper* (1850) 1 Mac & G 664; *Lincoln v Windsor* (1851) 9 Hare 158; *Broughton v Broughton* (1855) 5 De GM & G 160; *Re Barber*, *Burgess v Vinicome* (1886) 34 ChD 77; *Re Worthington, ex p Leighton v Macleod* [1954] 1 All ER 677, [1954] 1 WLR 526. As to remuneration under the Trustee Act 2000 see PARA 931 et seq post.

3 *Burden v Burden* (1813) 1 Ves & B 170; *Stocken v Dawson* (1843) 6 Beav 371; *Barrett v Hartley* (1866) LR 2 Eq 789; *Re Norrington, Brindley v Partridge* (1879) 13 ChD 654 at 662-663 per Bacon V-C.

4 *Christophers v White* (1847) 10 Beav 523; *Broughton v Broughton* (1855) 5 De GM & G 160; *Re Corsellis, Lawton v Elwes* (1887) 34 ChD 675, CA; *Re Gates, Arnold v Gates* [1933] Ch 913; *Re Hill, Claremont v Hill* [1934] Ch 623, CA (where the solicitor-trustee was a partner in a firm at a fixed salary payable out of the partnership profits). The principle also extends to any profit made by the solicitor-trustee under a contract for the employment of another solicitor to act for him on agency terms: see LEGAL PROFESSIONS vol 66 (2009) PARA 792. Where, however, the partner of a solicitor-trustee was appointed steward of a manor forming part of the trust estate, the firm was not accountable to the trust estate for fees received by him for manorial business and brought into the partnership accounts, since they were received by him as steward and not as a solicitor: *Re Corsellis, Lawton v Elwes* supra.

5 *Clack v Carlon* (1861) 7 Jur NS 441; *Re Doody, Hibbert v Lloyd* [1893] 1 Ch 129, CA. A solicitor-trustee who, in a trust matter, employs his firm (as opposed to one or more of his partners) is under the general disability in respect of profit costs, even though there is an agreement that the solicitor-trustee is not to share in the profit costs: *Re Gates, Arnold v Gates* [1933] Ch 913. If a solicitor-trustee agrees with a partner in his firm to transact the trust business on the footing that the partner alone is entitled to the remuneration, the agreement is good, even though it is not in writing: *Re Gates, Arnold v Gates* supra at 919 per Clauson J.

6 *Carmichael v Willson* (1830) 4 Bli NS 145, HL; *Pollard v Doyle, Kearns v Doyle* (1860) 1 Drew & Sm 319; *Macartney v Dickey* (1865) 16 I Ch R 409. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 40. For cases where a constructive trustee may be entitled to remuneration see PARA 937 post.

7 *Cradock v Piper* (1850) 1 Mac & G 664; *Lincoln v Windsor* (1851) 9 Hare 158. See also LEGAL PROFESSIONS vol 66 (2009) PARA 812.

8 *Whitney v Smith* (1869) 4 Ch App 513.

9     *Pince v Beattie* (1863) 9 Jur NS 1119.

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### **935. Effect of an express declaration in a will as to remuneration where death occurred before commencement of Trustee Act 2000.**

The creator of a trust may expressly declare that a trustee who is a solicitor or acts in some other professional character is to receive his usual professional remuneration for so acting<sup>1</sup>. For deaths occurring prior to 1 February 2001 such a declaration in a will amounts to a legacy to the trustee<sup>2</sup>; it is, therefore, void if he is an attesting witness to the will<sup>3</sup>, and does not take effect if the testator's estate is insolvent<sup>4</sup>, although it operates notwithstanding the bequest of a legacy to the trustee conditionally upon his accepting the trust<sup>5</sup>. The declaration does not authorise charges for services not strictly professional<sup>6</sup> unless expressly so worded<sup>7</sup>.

1 *Christophers v White* (1847) 10 Beav 523 at 524 per Lord Langdale MR; *Douglas v Archbutt* (1858) 2 De G & J 148; *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA; *Re Webb, Lambert v Still* [1894] 1 Ch 73, CA. Where in a will appointing professional trustees there was a provision entitling trustees to receive their ordinary professional charges, another professional trustee substituted by codicil was held entitled to the benefit of the provision: *Re Campbell* [1954] 1 All ER 448, [1954] 1 WLR 516. As to trust corporations appointed by a settlor or testator see PARAS 800-802 ante. As to remuneration under the Trustee Act 2000 see PARA 931 post.

2 For the position in the case of deaths on or after 1 February 2001 (ie the commencement of the Trustee Act 2000) see PARA 931 ante.

3 *Re Pooley* (1888) 40 ChD 1, CA; *Re White, Pennell v Franklin* [1898] 2 Ch 217, CA; *Re Brown, Wace v Smith* [1918] WN 118. It is, however, earned income for tax purposes (*Dale v IRC* [1954] AC 11, [1953] 2 All ER 671, HL); and it is not regarded as a beneficial interest in relation to the principle laid down in *Chapman v Chapman* [1954] AC 429, [1954] 1 All ER 798, HL, as to the general inability of the court under its inherent jurisdiction to vary beneficial interests (*Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA). As to the court's inherent jurisdiction to vary trusts see PARA 1060 post. An attesting witness who becomes a trustee of a will under an appointment of a new trustee made after the will has come into effect is not, however, debarred from benefiting from the provisions in the will entitling trustees to remuneration: *Re Royce's Will Trusts, Tildesley v Tildesley* [1959] Ch 626, [1959] 3 All ER 278, CA. As to attestation of a will see WILLS vol 50 (2005 Reissue) PARA 362 et seq.

4 *Re White, Pennell v Franklin* [1898] 2 Ch 217, CA. Where the estate is insufficient to pay general legacies in full, such a legacy abates with other general legacies and has no priority: *O'Higgins v Walsh* [1918] 1 IR 126; *Re Brown, Wace v Smith* (1918) 62 Sol Jo 487.

5 *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA.

6 *Harbin v Darby* (1860) 28 Beav 325; *Re Chapple, Newton v Chapman* (1884) 27 ChD 584; *Re Chalinder and Herington* [1907] 1 Ch 58.

7 *Re Ames, Ames v Taylor* (1883) 25 ChD 72; *Clarkson v Robinson* [1900] 2 Ch 722. As to the construction of such a declaration and the effect thereon of the trustee's retirement from private practice see *Glenister v Moody* [2003] EWHC 3155 (Ch), [2003] All ER (D) 242 (Nov). A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee: *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 at 1055 per Harman J; *Barlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139.

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### **936. Amount of remuneration.**

Unless specially authorised to do so, the trustees cannot bind the beneficiaries as to the amount of the remuneration to be paid to a solicitor-trustee or to an independent solicitor<sup>1</sup>; and a solicitor-trustee ought to inform the beneficiaries of their right to have his bill taxed<sup>2</sup>. The court has inherent jurisdiction to increase the amount of remuneration already allowed by the trust instrument if it concludes that this would be in the interests of the beneficiaries, having regard to the nature of the trust, to the experience and skill of a particular trustee and to the amounts which he seeks to charge when compared with what other trustees might require to be paid for their services, and to all the other circumstances of the case<sup>3</sup>.

1 *Re Fish, Bennett v Bennett* [1893] 2 Ch 413, CA; *Re Wellborne* [1901] 1 Ch 312, CA. A beneficiary has an absolute right, at his own risk as to costs, to have the accounts investigated and the charges gone into: *Re Fish, Bennett v Bennett* supra; *Re Wells, Wells v Wells* [1962] 2 All ER 826, [1962] 1 WLR 874, CA. In a claim by beneficiaries alleging that professional trustees of an instrument containing a charging clause have received excessive remuneration, the trustees, not having delivered any itemised particulars of charges, are not entitled to claim particulars of what would have been reasonable remuneration: *Re Wells, Wells v Wells* supra.

2 *Re Webb, Lambert v Still* [1894] 1 Ch 73, CA. See also *Allen v Jarvis* (1869) 4 Ch App 616. As to the amount of remuneration payable under a charging clause in a will where a company appointed trustee had different English and Canadian scales of remuneration see *Re Sandys' Will Trust, Sandys v Kirton* [1947] 2 All ER 302, CA.

3 *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA. See also *Re Keeler's Settlement Trusts, Keeler v Gledhill* [1981] Ch 156, [1981] 1 All ER 888; *Re Berkeley Applegate (Investment Consultants) Ltd (in liquidation), Harris v Conway* [1989] Ch 32, [1988] 3 All ER 71.

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### **937. Remuneration of constructive trustee.**

A constructive trustee may be entitled to an allowance or remuneration in respect of the time and trouble expended by him on property of which he is rightfully in possession but of which he is in equity a constructive trustee<sup>1</sup>.

<sup>1</sup> *Brown v Litton* (1711) 1 P Wms 140; *Brown v De Tastet* (1819) Jac 284; *Wedderburn v Wedderburn* (No 4) (1856) 22 Beav 84; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Re Berkeley Applegate (Investment Consultants) Ltd (in liquidation)*, *Harris v Conway* [1989] Ch 32, [1988] 3 All ER 71.



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### (iii) Disability to acquire Trust Property

#### 938. Trustee's disability to purchase trust property (the 'self-dealing rule').

Except by statute<sup>1</sup>, or under an express authority contained in the instrument creating the trust<sup>2</sup>, under an order of a court of competent jurisdiction<sup>3</sup> or with the consent of all the beneficiaries<sup>4</sup>, a person who is a trustee of, or has a power of sale over, trust property cannot effectively purchase it from himself since he cannot at the same time occupy the two positions of vendor and purchaser<sup>5</sup>; and one of several such persons cannot effectively purchase it from the others<sup>6</sup>. Any such purchase is automatically voidable at the instance of any beneficiary no matter how honest and fair the purchase may be<sup>7</sup>. If a trustee desires to purchase trust property, he must first be discharged from his trusteeship<sup>8</sup>; and even then, in order that the transaction may be unimpeachable, it must be clear that, in purchasing it, he is not taking an advantage of knowledge which he has acquired in respect of it during his trusteeship<sup>9</sup>. Moreover, he cannot sell the property to himself jointly with others, or to a trustee for himself<sup>10</sup>, or to another person with a view to its resale to himself<sup>11</sup>, although, if the sale is in all respects in good faith, he may sell to the trustees of his marriage settlement<sup>12</sup> or to a joint stock company in which he is a shareholder<sup>13</sup>. Similarly, a trustee of land who acquires and exercises a right of pre-emption conferred by the relevant trust instrument cannot purchase for himself if the purchase would involve a conflict of duty and interest<sup>14</sup>.

1 See eg the Settled Land Act 1925 s 68 (as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 878-879. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante. See further the Intestates' Estates Act 1952 s 5, Sch 2 para 5(1) (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 593.

2 See *Sergeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA; and PARA 697 ante. The articles of association of a company may exclude liability for a breach of the self-dealing rule (see note 5 infra) without also excusing a breach of the duty of loyalty: *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [54], [2004] 1 BCLC 131 at [54] per Mummery LJ.

3 *Campbell v Walker* (1800) 5 Ves 678 at 681 per Arden MR; *Farmer v Dean* (1863) 32 Beav 327; *Tennant v Trenchard* (1869) 4 Ch App 537 at 547 per Lord Hatherley LC. See also MORTGAGE vol 77 (2010) PARA 568.

4 As to the purchase of trust property with the consent of all the beneficiaries see PARA 945 post; and EQUITY vol 16(2) (Reissue) PARA 857.

5 *Whelpdale v Cookson* (1747) 1 Ves Sen 9; *Mackreth v Fox* (1791) 4 Bro Parl Cas 258, HL; *Ex p Lacey* (1802) 6 Ves 625 at 626 per Lord Eldon LC; *Ex p James* (1803) 8 Ves 337; *Randall v Errington* (1805) 10 Ves 423; *Downes v Grazebrook* (1817) 3 Mer 200; *Re Bloye's Trust* (1849) 1 Mac & G 488 at 495 et seq per Lord Cottenham LC; *Knight v Marjoribanks* (1849) 2 Mac & G 10 at 12; *Lewis v Hillman* (1852) 3 HL Cas 607; *Denton v Donner* (1856) 23 Beav 285 at 290 per Romilly MR; *Plowright v Lambert* (1885) 52 LT 646 at 652 per Field J; *Beningfield v Baxter* (1886) 12 App Cas 167, PC; *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167. The rule that, where a trustee purchases trust property from himself, any beneficiary may have the sale set aside, however fair the transaction, has been called the 'self-dealing rule': see *Tito v Waddell (No 2)* [1977] Ch 106 at 225, 241, [1977] 3 All ER 129 at 228, 241 per Megarry V-C. The rule also applies to a trustee who concurs in a transaction in which he has an interest and which cannot be carried into effect without his concurrence: *Re Thompson's Settlement, Thompson v Thompson* [1986] Ch 99, [1985] 2 All ER 720; and see *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862. Cf *Kane v Radley-Kane* [1999] Ch 274, [1998] 3 All ER 753, where it was held to be a breach of the self-dealing rule for a sole personal representative of an intestate estate to appropriate to herself unquoted shares in satisfaction of her statutory legacy, unless she had been

authorised to do so by the other beneficiaries, or the court had sanctioned the appropriation; applied in *Fazio v Rush* [2002] All ER (D) 392 (Jul).

6 *Whichcote v Lawrence* (1798) 3 Ves 740; *Ex p Reynolds* (1800) 5 Ves 707; *Morse v Royal* (1806) 12 Ves 355 at 372 per Lord Erskine LC; *Re Norrington, Brindley v Partridge* (1879) 13 ChD 654.

7 *Ex p James* (1803) 8 Ves 337; *Holder v Holder* [1968] Ch 353 at 397-398, [1968] 1 All ER 665 at 677, CA. However, in *Holder v Holder* supra the Court of Appeal uniquely refused to set aside a purchase by a beneficiary who had been appointed executor and trustee (with two others) of a will but who had renounced his office after taking some minor incidental steps in administering the estate which were conceded to render his renunciation ineffective. He was tenant of a farm comprised in the estate and purchased the freehold at auction. The court stressed that he had played no real part in the administration of the estate and had not been involved in instructing valuers and arranging the auction sale and so was not both vendor and purchaser, any special knowledge he had being acquired as tenant, and the beneficiaries knew he was a prospective purchaser and did not look to him to protect their interests.

8 *Campbell v Walker* (1800) 5 Ves 678 at 681 per Arden MR; *Ex p Lacey* (1802) 6 Ves 625 at 626-627; *Ex p James* (1803) 8 Ves 337 at 348; *Downes v Grazebrook* (1817) 3 Mer 200 at 208 per Lord Eldon LC; *Re Boles and British Land Co's Contract* [1902] 1 Ch 244. If the trustee desires to purchase, and is willing to give more for the property than anyone else, he should apply to a court of competent jurisdiction which would then assume conduct of the sale divesting him of his character of trustee in respect of it, and authorising him to bid at it: *Campbell v Walker* supra at 681 per Arden MR.

9 *Ex p Lacey* (1802) 6 Ves 625 at 626-627; *Holder v Holder* [1968] Ch 353 at 397-398, [1968] 1 All ER 665 at 677, CA.

10 *Downes v Grazebrook* (1817) 3 Mer 200; *Robertson v Norris* (1857) 1 Giff 421 (affd (1858) 4 Jur NS 443); *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 409, CA, per Lindley LJ. There is no absolute rule precluding the wife of a trustee purchasing from the trustees: *Burrell v Burrell's Trustees* 1915 SC 333, Ct of Sess; *Tanti v Carlson* [1948] VLR 401 (where, however, the opinion was expressed that the special nature of the matrimonial relationship renders such a transaction open to suspicion, the court presuming that the sale is for the benefit of the trustee and requiring evidence to rebut this presumption); *Re King's Will Trust, Newman v Andrews* (1959) 173 Estates Gazette 627; *Tito v Waddell (No 2)* [1977] Ch 106 at 241, [1977] 3 All ER 129 at 241, per Megarry V-C.

11 *Sanderson v Walker, Campbell v Walker* (1807) 13 Ves 601; *Cook v Collingridge* (1823) Jac 607.

12 *Hickley v Hickley* (1876) 2 ChD 190.

13 *Farrar v Farrars Ltd* (1888) 40 ChD 395, CA. It is otherwise where the trustee is a director: *Re Thompson's Settlement, Thompson v Thompson* [1986] Ch 99, [1985] 2 All ER 720.

14 *Wright v Morgan* [1926] AC 788, PC (where the price was to be fixed by valuation, although it was up to the trustees to decide when the land was first to be offered for sale). A person who subsequently becomes a trustee is not, however, precluded from exercising a right of pre-emption contained in a contract made before the fiduciary relationship arose: *Re Mulholland's Will Trusts, Bryan v Westminster Bank Ltd* [1949] 1 All ER 460.

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### **939. Solicitor or agent of trustee.**

The disability to purchase the trust property extends to a person who is the solicitor or agent of a trustee and is employed by the trustee in connection with the sale of the trust property<sup>1</sup>.

<sup>1</sup> *Twining v Morrice* (1788) 2 Bro CC 326; *York Buildings Co v Mackenzie* (1795) 8 Bro Parl Cas 42; *Ex p Bennett* (1805) 10 Ves 381; *Whitcomb v Minchin* (1820) 5 Madd 91; *Re Bloye's Trust* (1849) 1 Mac & G 488 at 494 et seq per Lord Cottenham LC; *Lewis v Hillman* (1852) 3 HL Cas 607; *Cookson v Lee* (1853) 23 LJ Ch 473; *Spring v Pride* (1864) 4 De GJ & SM 395; *King v Anderson* (1874) 18 IR 8 Eq 625, 18 CA; *Martinson v Clowes* (1882) 21 ChD 857 (on appeal (1885) 52 LT 706, CA); *Luddy's Trustee v Peard* (1886) 33 ChD 500; *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 409, CA, per Lindley LJ. Where a sale by trustees for sale to their solicitors was set aside, a mortgage of the property by the solicitors to persons who had constructive notice of the circumstances of the sale was also set aside: *Cookson v Lee* (1853) 23 LJ Ch 473. Trusts for sale of land are now subsumed under trusts of land: see PARA 605 note 5 ante. See also PARA 724 ante.

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#### **940. Repurchase by a trustee for himself.**

After selling trust property to an independent person under a trust of land, a trustee cannot repurchase it for himself so long as the contract for sale to that person remains executory and he has power either to enforce it or to rescind or alter it<sup>1</sup>. A subsequent repurchase by a trustee after a sale in good faith to a third person and the lapse of a considerable period will not, however, be set aside on the ground that, when he sold the property, he hoped to repurchase it for himself at some future time<sup>2</sup>.

1 *Parker v McKenna* (1874) 10 Ch App 96 at 125, CA, per Mellish LJ; *Williams v Scott* [1900] AC 499, PC; *Delves v Gray* [1902] 2 Ch 606. These cases involved a trust for sale, but it is thought that the same principles would apply to a trust of land under the Trusts of Land and Appointment of Trustees Act 1996. A trust for sale of land is now subsumed under a trust of land: see ss 1, 4, 5; para 605 note 5 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 66. For the meaning of 'trust of land' see PARA 605 note 5 ante.

A trustee may not repurchase if there has been some previous agreement or understanding between himself and the purchaser as to the subsequent purchase: see *Parker v McKenna* supra at 126.

2 *Baker v Peck* (1861) 9 WR 472, CA; *Re Postlethwaite*, *Postlethwaite v Rickman* (1888) 37 WR 200, CA; cf *Hurrell v Littlejohn* [1904] 1 Ch 689.

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#### **941. Trustee otherwise than for sale.**

A trustee for purposes other than sale cannot purchase the property where the purchase would conflict with his duties respecting it or his position in regard to it<sup>1</sup>.

<sup>1</sup> *Parkes v White* (1805) 11 Ves 209 at 232 et seq per Lord Eldon LC. See also EQUITY vol 16(2) (Reissue) PARA 857. In connection with trust property trustees must put their own interest entirely out of the question, and this is so difficult in a transaction in which they are dealing with themselves that the court at once and without inquiry decides that such a transaction cannot stand: *Cook v Collingridge* (1823) Jac 607 at 621 per Lord Eldon LC. The disability to purchase extends to a trustee who has completed his active duties in respect of the property and has become a bare trustee (see PARA 755 ante) in relation to it (*Ex p Bennett* (1805) 10 Ves 381), but it does not extend to a trustee who has had no active duties in connection with the property, such as formerly a trustee to preserve contingent remainders (*Pooley v Quilter* (1858) 4 Drew 184 at 189 per Kindersley V-C), or a person who was named as a trustee but who disclaimed or never acted (*Mackintosh v Barber* (1822) 1 Bing 50; *Stacey v Elph* (1833) 1 My & K 195; *Clark v Clark* (1884) 9 App Cas 733, PC). See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 45. It is thought that there is no objection to a person who is a trustee of a settlement within the Settled Land Act 1925 purchasing the settled land or any part of it from the tenant for life. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

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## 942. Setting aside a purchase by a trustee.

A purchase by a trustee can be set aside against a subsequent purchaser from him with notice<sup>1</sup>. A purchase by a trustee is not, however, set aside by a court of equity if there has been delay or acquiescence on the part of the beneficiary or subsequent dealings by him on the footing of its having taken place<sup>2</sup>. Where it is set aside at the instance of all the beneficiaries, the property will be ordered to be reconveyed in consideration of the payment to the trustee of the price at which he bought, with interest<sup>3</sup>; while the trustee, or any purchaser from the trustee with notice, accounts for the rents and profits since the purchase by the trustee, but without interest on it, or, if he has been in actual possession, is charged with an occupation rent<sup>4</sup>. In addition to his purchase money, the trustee will be entitled to an allowance with interest for improvements and repairs made by him which are substantial and lasting<sup>5</sup>, or tend to enhance the price of the property on a resale<sup>6</sup>; and, if he has done anything to deteriorate its value, the amount of the deterioration will be deducted from what he receives<sup>7</sup>.

If the beneficiaries are not agreed in requiring a reconveyance, the property will be resold under the direction of the court<sup>8</sup>. In this case it is put up at a sum representing the price at which the trustee purchased it<sup>9</sup>, together with the value of any repairs and improvements made by him<sup>10</sup>, and, if a higher sum is offered, it is sold for that figure, but, if not, the trustee is held to his purchase<sup>11</sup>.

If, before the transaction is impeached, the trustee has resold the property to a purchaser for valuable consideration without notice<sup>12</sup>, the beneficiary may require the trustee to account for the difference in the price, with interest<sup>13</sup>, or the difference between the sum paid by the trustee for the property and its real value<sup>14</sup>.

1 *Cookson v Lee* (1853) 23 LJ Ch 473; *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544, HL. If the trustee has resold at a profit, the beneficiaries may adopt the sale and recover the profit: see *Baker v Carter* (1835) 1 Y & C Ex 250.

2 *Randall v Errington* (1805) 10 Ves 423 at 427 per Grant MR; *Gregory v Gregory* (1815) Coop G 201 at 205 per Grant MR (affd (1821) Jac 631); *Roberts v Tunstall* (1845) 4 Hare 257; *Re Worssam, Hemery v Worssam* (1882) 51 LJ Ch 669; *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA.

3 A rate of 5% was ordered in *Holder v Holder* [1968] Ch 353 at 374, [1966] 2 All ER 116 at 130; revsd [1968] Ch 353, [1968] 1 All ER 665, CA. The rate will not necessarily be the same today.

4 *York Buildings Co v Mackenzie* (1795) 8 Bro Parl Cas 42, HL; *Macartney v Blackwood* (1795) Ridg L & S 602; *Ex p James* (1803) 8 Ves 337 at 351; *Smedley v Varley* (1857) 23 Beav 358 at 359; *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167; *Wright v Morgan* [1926] AC 788, PC; *Holder v Holder* [1968] Ch 353 at 370-371, 373-375 (on appeal [1968] Ch 353 at 389, [1968] 1 All ER 665 at 669, CA, where the form of order was approved obiter by Harman LJ, although the appeal was allowed). If a trustee specifically devises trust property that he has purchased and the purchase is set aside, the specific devisee, not the residuary legatee, takes the repaid purchase money: *Re Sherman, Re Walters, Trevenen v Pearce* [1954] Ch 653, [1954] 1 All ER 893.

5 *York Buildings Co v Mackenzie* (1795) 8 Bro Parl Cas 42 at 71, HL; *Re Dumbell, ex p Hughes, ex p Lyon* (1802) 6 Ves 617; *Ex p Bennett* (1805) 10 Ves 381 at 400 per Lord Eldon LC; *King v Anderson* (1874) IR 8 Eq 625 at 639, Ir CA.

6 *Ex p Bennett* (1805) 10 Ves 381 at 400.

7 *Ex p Bennett* (1805) 10 Ves 381 at 401.

8     *Campbell v Walker* (1800) 5 Ves 678; *Lister v Lister* (1802) 6 Ves 631.

9     *Lister v Lister* (1802) 6 Ves 631.

10    *Re Dumbell, ex p Hughes, ex p Lyon* (1802) 6 Ves 617 at 625; *Robinson v Ridley* (1821) 6 Madd 2.

11    *Ex p Reynolds* (1800) 5 Ves 707; *Ex p Lacey* (1802) 6 Ves 625; *Lister v Lister* (1802) 6 Ves 631; *Holder v Holder* [1968] Ch 353 at 370-371, 373-375 (on appeal [1968] Ch 353 at 389, [1968] 1 All ER 665 at 669, CA, where this was approved obiter, although the appeal was allowed).

12    As to the acquisition of trust property without notice of the trust see PARA 699 ante.

13    *Hall v Hallet* (1784) 1 Cox Eq Cas 134 at 138; *Mackreth v Fox* (1791) 4 Bro Parl Cas 258, HL; *Whichcote v Lawrence* (1798) 3 Ves 740; *Ex p Reynolds* (1800) 5 Ves 707; *Baker v Carter* (1835) 1 Y & C Ex 250 at 252. As to the rate of interest see note 3 supra.

14    *Mackreth v Fox* (1791) 4 Bro Parl Cas 258, HL; *Lord Hardwicke v Vernon* (1799) 4 Ves 411; *Baker v Carter* (1835) 1 Y & C Ex 250 at 252.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(iii) Disability to acquire Trust Property/943. Leases and mortgages to trustees.

### **943. Leases and mortgages to trustees.**

A lease may be granted in writing by two or more trustees to one of them, or, where there are more than two trustees, to some of them, and is effective to pass the legal estate<sup>1</sup>, but in general<sup>2</sup> it is not binding in equity and is liable to be set aside<sup>3</sup>. Trustees who have power to mortgage the trust property<sup>4</sup> may exercise that power, subject to the terms of the trust instrument, by way of mortgage to one of their number on fair terms, and the trustee-mortgagee can subsequently exercise his powers as mortgagee adversely to the trust<sup>5</sup>.

1 See the Law of Property Act 1925 ss 72(4), 205(1)(ii); and *Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL. The Law of Property Act 1925 s 72(3) (see REAL PROPERTY) does not, however, enable a single trustee to grant a lease to himself, and neither s 72(3) nor s 72(4) enables two or more trustees to grant a lease to the whole of their number: see *Rye v Rye* supra.

2 As to the power conferred on the trustees of a settlement to lease land to the tenant for life, notwithstanding that he is one of the trustees, see SETTLEMENTS vol 42 (Reissue) PARA 878.

3 See the Law of Property Act 1925 s 72(4) proviso; and *Re Dumbell, ex p Hughes, ex p Lyon* (1802) 6 Ves 617 at 622 per Lord Eldon LC. See also *Re John's Assignment Trusts, Niven v Niven* [1970] 2 All ER 210n at 214n, [1970] 1 WLR 955 at 960.

4 As to the general power to raise money by mortgage see the Trustee Act 1925 s 16; and PARA 1055 post.

5 *A-G v Hardy* (1851) 1 Sim NS 338; *Re Mason's Orphanage and London and North Western Ry Co* [1896] 1 Ch 54 at 59 per Stirling J. It is open to question whether this principle applies to private trusts where trustees must act unanimously (unless authorised to act by a majority) as opposed to charitable trusts where trustees can act by a majority: see Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 813.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(iv) Bargains with Beneficiaries/944. Bargains to prejudice of beneficiary.

#### **(iv) Bargains with Beneficiaries**

##### **944. Bargains to prejudice of beneficiary.**

A bargain or arrangement between a trustee and a beneficiary with reference to the trust property by which the interest of the beneficiary in that trust property is in any way prejudiced is liable to be set aside unless it can be shown that the beneficiary, in concurring in it, was fully aware of all the circumstances of the case and had not been subjected to any pressure or undue influence<sup>1</sup>.

<sup>1</sup> *Fine Industrial Commodities Ltd v Powling* (1954) 71 RPC 253 at 262. See also *Hylton v Hylton* (1754) 2 Ves Sen 547; *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461, HL; *Ellis v Barker* (1871) 7 Ch App 104; *Costa Rica Rly Co Ltd v Forwood* [1901] 1 Ch 746 at 760-761, CA, per Vaughan Williams LJ. As to undue influence see EQUITY vol 16(2) (Reissue) PARA 417; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. In order to be impeachable the transaction must be connected with the trust, and the rule does not extend to dealings between a mortgagee and a mortgagor: *Knight v Marjoribanks* (1849) 2 Mac & G 10. A dealing of a trustee with a beneficiary may be upheld if it is fair in all respects, and it is clear that he knew his rights and that the facts were correctly represented to him: *Luther v Bianconi* (1860) 10 I Ch R 194 at 200 per Brady LC. A trustee may take from a beneficiary to whom he lends money a mortgage of the equitable share or interest of that beneficiary in the trust property and may avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice: *Phipps v Lovegrove*, *Prosser v Phipps* (1873) LR 16 Eq 80 at 88 per James LJ; *Newman v Newman* (1885) 28 ChD 674. See also CHOSER IN ACTION vol 13 (2009) PARA 65; EQUITY vol 16(2) (Reissue) PARA 573. As to the validity of gifts from a beneficiary to a trustee see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 848.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(iv) Bargains with Beneficiaries/945. Purchase by trustee of trust property with beneficiaries' consent.

#### **945. Purchase by trustee of trust property with beneficiaries' consent.**

A trustee may purchase the trust property if he has the consent of all the beneficiaries and if he shows: (1) that he has taken no advantage of his position; and (2) that the beneficiaries were fully informed and received full value<sup>1</sup>. It is sensible to ensure that the beneficiaries obtain independent professional advice<sup>2</sup>.

The same principle applies to constructive trustees or trustees de son tort<sup>3</sup> and to solicitors and agents and other persons in a fiduciary position to the vendor<sup>4</sup>. The principle does not, however, apply to purchases by a mortgagee from a mortgagor<sup>5</sup>.

1 *Gibson v Jeyes* (1801) 6 Ves 266; *Ex p Lacey* (1802) 6 Ves 625; *Morse v Royal* (1806) 12 Ves 355; *Denton v Donner* (1856) 23 Beav 285; *Dover v Buck* (1865) 5 Giff 57; *Thomson v Eastwood* (1877) 2 App Cas 215, HL; *Williams v Scott* [1900] AC 499 at 503, PC; *Dougan v Macpherson* [1902] AC 197, HL; *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA; *Tito v Waddell (No 2)* [1977] Ch 106 at 225, 241, [1977] 3 All ER 129 at 228, 241.

2 *Luff v Lord* (1864) 34 Beav 220 at 228 (affd (1865) 11 LT 695); *Plowright v Lambert* (1885) 52 LT 646 at 651. Independent legal advice may not be essential in all cases: *Readdy v Pendergast* (1886) 55 LT 767 at 768 per Kekewich J. See also *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 135, PC; *Re Brocklehursts' Estate, Hall v Roberts* [1978] Ch 14, [1978] 1 All ER 767, CA. Cf EQUITY vol 16(2) (Reissue) PARA 422.

3 *Plowright v Lambert* (1885) 52 LT 646. As to trustees de son tort generally see PARAS 698 ante, 1056, 1088 post.

4 *Gibson v Jeyes* (1801) 6 Ves 266; *Holman v Loynes* (1854) 4 De GM & G 270; *Spencer v Topham* (1856) 22 Beav 573; *Johnson v Fesemeyer* (1858) 3 De G & J 13; *Tate v Williamson* (1866) 2 Ch App 55; *Cockburn v Edwards* (1881) 18 ChD 449 at 455, CA, per Jessel MR; *Luddy's Trustee v Peard* (1886) 33 ChD 500; *Barron v Willis* [1900] 2 Ch 121, CA (affd sub nom *Willis v Barron* [1902] AC 271, HL). Those persons include counsel in relation to their clients: *Carter v Palmer* (1841) 8 Cl & Fin 657, HL. Purchases by such persons will, however, be upheld if the vendor is separately advised and fully cognisant of the circumstances: *Edwards v Meyrick* (1842) 2 Hare 60 at 68 et seq; *Holman v Loynes* supra at 281 et seq; *Barnard v Hunter* (1856) 5 WR 92.

5 A mortgagee cannot sell to himself either directly or through an agent: *Farrar v Farrars Ltd* (1888) 40 ChD 395, CA; *Williams v Wellingborough Borough Council* [1975] 3 All ER 462, [1975] 1 WLR 327, CA (but as to the vesting of a house in an authority entitled to exercise the power of sale see the Housing Act 1985 s 452 (as amended), Sch 17; and HOUSING vol 22 (2006 Reissue) PARA 704). The principle does not apply to purchase by a partner from the representatives of a deceased partner: *Chambers v Howell* (1847) 11 Beav 6; *Knox v Gye* (1872) LR 5 HL 656 at 675.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/2. TRUSTEES/(6) DISABILITIES OF TRUSTEES/(iv) Bargains with Beneficiaries/946. Purchase by trustee of beneficiary's equitable interest (the 'fair dealing rule').

**946. Purchase by trustee of beneficiary's equitable interest (the 'fair dealing rule').**

A trustee may purchase the beneficial interest of a beneficiary if he can establish the propriety of the transaction, showing that he had taken no advantage of his position and that the beneficiary was fully informed and received full value<sup>1</sup>.

<sup>1</sup> *Clarke v Swaile* (1762) 2 Eden 134; *Coles v Trecothick* (1804) 9 Ves 234; *Randall v Errington* (1805) 10 Ves 423; *Morse v Royal* (1806) 12 Ves 355; *Sanderson v Walker, Campbell v Walker* (1807) 13 Ves 601; *Dover v Buck* (1865) 5 Giff 57; *Tito v Waddell (No 2)* [1977] Ch 106 at 225, [1977] 3 All ER 129 at 228 per Megarry V-C, who referred to this as the 'fair dealing rule'. See also *Movitex Ltd v Bulfield* [1988] BCLC 104 at 121 (where Vinelott J observed that a trustee who is in breach of the fair dealing rule is not strictly guilty of a breach of trust but of the duty he owes to the beneficiary to make full disclosure and to deal fairly with him arising from his fiduciary position); *Hill v Langley* (1988) Times, 28 January, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(i) In general/A. NATURE OF DUTIES/947. A duty must be performed.

### **3. ADMINISTRATION OF TRUSTS**

#### **(1) DUTIES OF TRUSTEES**

##### **(i) In general**

##### **A. NATURE OF DUTIES**

#### **947. A duty must be performed.**

It is in the nature of a duty that its performance is obligatory and may be compelled by the court<sup>1</sup>. Powers on the other hand are to a greater or lesser degree discretionary in nature<sup>2</sup>. The court will not normally compel the exercise of a power against the trustee's wishes<sup>3</sup> but it will compel performance of such powers attached to a trust as are of the nature of a trust or obligation, as in the case of discretionary trusts<sup>4</sup>. A trustee who fails to carry out his duties will be in breach of trust<sup>5</sup>.

1 As to interference by the court where a trustee improperly fails to carry out a duty see PARA 1067 post. As to a trustee's duties generally see PARA 948 et seq post.

2 As to a trustee's powers generally see PARA 973 et seq post.

3 *Tempest v Lord Camoys*(1868) 21 ChD 576n, CA.

4 *Nickisson v Cockill* (1863) 3 De GJ & Sm 622 at 633-634 per Lord Westbury LC; *Tempest v Lord Camoys*(1868) 21 ChD 576n, CA; *Re Courtier, Coles v Courtier, Courtier v Coles*(1886) 34 ChD 136 at 141, CA, per Bowen LJ; *Re Hill, Hill v Pilcher*[1896] 1 Ch 962 at 966 per Kekewich J; *McPhail v Doulton*[1971] AC 424, [1970] 2 All ER 228, HL. 'Where duty and power are coupled the court can compel the trustees to perform the duty': *McPhail v Doulton* supra at 442 and 234 per Lord Hodson.

5 As to breach of trust see PARA 1084 et seq post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(i) In general/B. PERFORMANCE OF DUTIES AND POWERS/(A) General Standard of Care/948. Trustee's duty to use diligence and prudence.

## **B. PERFORMANCE OF DUTIES AND POWERS**

### **(A) GENERAL STANDARD OF CARE**

#### **948. Trustee's duty to use diligence and prudence.**

A trustee must execute the trust with reasonable diligence<sup>1</sup>, and conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs, but beyond this he is not bound to adopt further precautions<sup>2</sup>. A higher standard of care is due from a trust corporation or similar body which carries on a specialised business of trust management, and a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund through its neglect to exercise the special care and skill which it professes to have<sup>3</sup>. In cases of doubt or difficulty a trustee may take legal advice<sup>4</sup> and other expert advice<sup>5</sup>. If mistaken, that advice would not formerly have relieved him from responsibility<sup>6</sup>, but it may now do so if it was reasonable for the trustee to have acted on it, especially in relation to a small estate<sup>7</sup>. If a point is not clear, then, as a rule, the trustee should obtain the direction of the court<sup>8</sup>.

1 *Charitable Corp'n v Sutton* (1742) 2 Atk 400 at 406 per Lord Hardwicke LC.

2 *Bacon v Bacon* (1800) 5 Ves 331; *Joy v Campbell* (1804) 1 Sch & Lef 328 at 341-342 per Lord Resedale LC; *Massey v Banner* (1820) 1 Jac & W 241 at 247 per Lord Eldon LC; *Clough v Bond* (1838) 3 My & Cr 490 at 497 per Lord Cottenham LC; *Speight v Gaunt* (1883) 9 App Cas 1 at 19, HL, per Lord Blackburn (approving 22 ChD 727 at 739-740, CA, per Jessel MR); *Re Whiteley, Whiteley v Learoyd* (1886) 33 ChD 347 at 355, CA, per Lindley LJ; *Bullock v Bullock* (1886) 56 LJ Ch 221; *Robinson v Harkin* [1896] 2 Ch 415 at 424 per Stirling J; *Re Lucking's Will Trusts, Renwick v Lucking* [1967] 3 All ER 726, [1968] 1 WLR 866. The degree of prudence which the particular trustee actually uses in the management of his own affairs is not a proper standard: *Rae v Meek* (1889) 14 App Cas 558 at 569-570, HL, per Lord Herschell; *Re Lord De Clifford's Estate, Lord De Clifford v Quilter, Lord De Clifford v Marquis of Lansdowne* [1900] 2 Ch 707 at 716 per Farwell J. A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee (*National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373, PC; *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151, CA; *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167), and a bank which advertises itself as taking charge of administrations is under a special duty (*Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 at 1055 per Harman J). See also the text to note 3 *infra*. Trustees are not insurers of the trust property: *Re Hurst, Addison v Topp* (1892) 67 LT 96 at 99, CA. Cf the Trustee Act 1925 s 61; and PARA 1123 *post*. See also *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750 (pension fund trustee).

3 *Barlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 534, [1980] 1 All ER 139 at 152.

4 *Poole v Pass* (1839) 1 Beav 600; *Re Tryon* (1844) 7 Beav 496 at 498; *Stephens v Lord Newborough* (1848) 11 Beav 403. It has been stated in a number of cases that a trustee is not necessarily protected from liability if he acts wrongly upon a wrong opinion of counsel: *Firmin v Pulham* (1848) 2 De G & Sm 99 at 100-101; *Devey v Thornton* (1851) 9 Hare 222 at 232 per Turner V-C; *Boulton v Beard* (1853) 3 De GM & G 608; *Re Knight's Trusts* (1859) 27 Beav 45 at 49-50 per Romilly MR; *Re Jackson, Wilson v Donald* (1881) 44 LT 467; *Stott v Milne* (1884) 25 ChD 710 at 714, CA, per Lord Selborne LC; *Davis v Hutchings* [1907] 1 Ch 356 at 365 per Kekewich J. As to wrong payments made on counsel's advice see LEGAL PROFESSIONS vol 66 (2009) PARA 1134. It seems, however, that a court is more likely nowadays than formerly to exonerate a trustee if he acts on the advice of counsel who is adequately and truly instructed on the facts: see the text and notes 6-7 *infra*.

5 *Re Pearson, Oxley v Scarth* (1884) 51 LT 692 at 694 per Pearson J; *Learoyd v Whiteley* (1887) 12 App Cas 727 at 734, HL, per Lord Watson.

6 *Doyle v Blake* (1804) 2 Sch & Lef 231 at 243 per Lord Redesdale LC; *Re Knight's Trusts* (1859) 27 Beav 45 at 49 per Romilly MR; *Stott v Milne* (1884) 25 ChD 710 at 714, CA; *Learoyd v Whiteley* (1887) 12 App Cas 727 at 734, HL.

7 See *Re Allsop, Whittaker v Bamford* [1914] 1 Ch 1, CA (where it was held that trustees could not be said to have acted unreasonably merely because they had under legal advice taken a wrong view of the construction of a will, and they were entitled to be relieved of liability under provisions now re-enacted in the Trustee Act 1925 s 61 (see PARA 1123 post)).

8 *Re Brogden, Billing v Brogden* (1888) 38 ChD 546 at 556, CA, per North J. See also *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, CA; and PARA 1074 post. A trustee's omission to obtain the direction of the court is not necessarily culpable: see the Trustee Act 1925 s 61; and PARA 1123 post.

## UPDATE

### 948 Trustee's duty to use diligence and prudence

NOTES 2, 3--See *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch), [2009] 1 All ER (Comm) 457 (rights of trust company against its directors not held on trust for beneficiaries of trust settlement).

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## (B) STATUTORY DUTY OF CARE UNDER THE

### 949. The statutory duty of care.

Part I of the Trustee Act 2000<sup>1</sup> establishes a statutory duty of care<sup>2</sup> applicable to trustees when carrying out certain functions<sup>3</sup>. Whenever the duty applies<sup>4</sup> to a trustee he must exercise such care and skill as is reasonable in the circumstances<sup>5</sup>, having regard in particular:

- 185 (1) to any special knowledge or experience that he has or holds himself out as having<sup>6</sup>; and
- 186 (2) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession<sup>7</sup>.

The statutory duty does not, however, alter the principles relating to the exercise of discretionary powers by trustees<sup>8</sup>. The decision whether to exercise a discretion remains a matter for the trustees to determine; and the manner in which they exercise it will be measured against the appropriate standard of care<sup>9</sup> rather than being subject to the statutory duty of care.

The statutory duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply<sup>10</sup>.

1    Ie the Trustee Act 2000 Pt I (ss 1-2). As to the application of Pt I to pension schemes see s 36(2). 'Pension scheme' means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 741) established under a trust and subject to the law of England and Wales: Trustee Act 2000 s 36(1).

2    Ibid ss 1(2), 39(2). The Law Commission took the view that the statutory duty of care 'probably' represents no more than a codification of the existing common law duty (see PARA 948 ante): *Trustees' Powers and Duties* (Law Com No 260) (1999) at paras 2.35, 3.24(3).

3    For the meaning of 'functions' see PARA 903 note 1 ante. As to the application of the Trustee Act 2000 to personal representatives see s 35; and PARA 602 ante. As to personal representatives see further EXECUTORS AND ADMINISTRATORS.

4    As to when the duty of care applies see *ibid* s 2, Sch 1; and PARA 950 post.

5    Ibid s 1(1).

6    Ibid s 1(1)(a).

7    Ibid s 1(1)(b).

8    As to the exercise of discretionary powers see PARA 979 post.

9    As to the appropriate standard of care see PARA 948 ante.

10    See the Trustee Act 2000 Sch 1 para 7; and PARA 950 post.





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## **950. Functions to which the statutory duty of care applies.**

The statutory duty of care<sup>1</sup> applies to a trustee when exercising certain powers or carrying out certain duties<sup>2</sup> in relation to: (1) investment<sup>3</sup>; (2) acquisition of land<sup>4</sup>; (3) agents, nominees and custodians<sup>5</sup>; (4) compounding of liabilities<sup>6</sup>; (5) insurance<sup>7</sup>; (6) reversionary interests, valuations and audit<sup>8</sup>. The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply<sup>9</sup>.

1 As to the statutory duty of care see PARA 949 ante.

2 See the Trustee Act 2000 s 2, Sch 1.

3 The statutory duty of care applies to a trustee: (1) when exercising the general power of investment or any other power of investment however conferred; (2) when carrying out a duty to which he is subject under *ibid* s 4 (see PARA 1013 post) or s 5 (see PARA 1014 post): Sch 1 para 1. For the meaning of 'the general power of investment' see PARA 1012 post.

4 The statutory duty of care applies to a trustee: (1) when exercising the power under *ibid* s 8 to acquire land (see PARA 1034 post); (2) when exercising any other power to acquire land however conferred; (3) when exercising any power in relation to land acquired under a power mentioned in head (1) or head (2) *supra*: Sch 1 para 2.

5 The statutory duty of care applies to a trustee: (1) when entering into arrangements under which a person is authorised under *ibid* s 11 to exercise functions as an agent (see PARA 989 post); (2) when entering into arrangements under which a person is appointed under s 16 to act as a nominee (see PARA 991 post); (3) when entering into arrangements under which a person is appointed under s 17 or s 18 to act as a custodian (see PARA 991 post); (4) when entering into arrangements under which, under any other power, however conferred, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian; (5) when carrying out his duties under s 22 (see PARA 995 post): Sch 1 para 3(1). For the meaning of 'custodian' see PARA 991 note 4 post. For these purposes, entering into arrangements under which a person is authorised to exercise functions or is appointed to act as nominee or custodian includes, in particular, selecting the person who is to act, determining any terms on which he is to act, and, if the person is being authorised to exercise asset management functions, the preparation of a policy statement under s 15 (see PARA 990 post): Sch 1 para 3(2). For the meaning of 'asset management functions' see PARA 990 note 7 post.

6 The statutory duty of care applies to a trustee: (1) when exercising the power under the Trustee Act 1925 s 15 (as amended) (see PARA 1052 post) to do any of the things referred to in that provision; (2) when exercising any corresponding power, however conferred: Trustee Act 2000 Sch 1 para 4.

7 The statutory duty of care applies to a trustee: (1) when exercising the power under the Trustee Act 1925 s 19 (as substituted) to insure property (see PARAS 1047-1048 post); (2) when exercising any corresponding power, however conferred: Trustee Act 2000 Sch 1 para 5.

8 The statutory duty of care applies to a trustee: (1) when exercising the power under the Trustee Act 1925 s 22(1) or (3) (s 22 as amended) to do any of the things referred to in those provisions (see PARA 1054 post); (2) when exercising any corresponding power, however conferred: Trustee Act 2000 Sch 1 para 6.

9 *Ibid* Sch 1 para 7.

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## (C) IMPARTIALITY

### 951. Duty to act impartially between beneficiaries.

Except where the instrument creating the trust expressly gives him a discretion as to adopting a course which will benefit one beneficiary at the expense of the others<sup>1</sup>, it is the duty of a trustee to hold an even hand between the parties interested under the trust, and to look at the interests of all and not to those of any particular beneficiary or class of beneficiaries<sup>2</sup>. The legitimate expectation of potential beneficiaries should be taken into account<sup>3</sup>. The trustee must not be a partisan of one of several beneficiaries<sup>4</sup>.

1 *Re Chancellor, Chancellor v Brown*(1884) 26 ChD 42, CA; *Re Burrage, Burningham v Burrage* (1890) 62 LT 752; *Re Crowther, Midgley v Crowther*[1895] 2 Ch 56; *Train v Clapperton*[1908] AC 342, HL; *Re Charteris, Charteris v Biddulph*[1917] 2 Ch 379, CA. Executors in the course of administering a testator's estate are under a duty to consider the estate as a whole but are not under a duty to act impartially between the beneficiaries: *Re Hayes's Will Trusts, Pattinson v Hayes*[1971] 2 All ER 341, [1971] 1 WLR 758. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 439.

2 *Howe v Earl of Dartmouth, Howe v Countess of Aylesbury* (1802) 7 Ves 137; *Mortlock v Buller* (1804) 10 Ves 292 at 309 per Lord Eldon LC; *Burges v Lamb* (1809) 16 Ves 174 at 178; *Anon* (1821) 6 Madd 10 at 11; *Davies v Wescomb* (1828) 2 Sim 425; *Hutchinson v Morritt* (1839) 3 Y & C Ex 547; *Benn v Dixon* (1840) 10 Sim 636; *Stuart v Stuart* (1841) 3 Beav 430; *Mortimer v Watts* (1852) 14 Beav 616 at 623 per Romilly MR; *Raby v Ridehalgh* (1855) 7 De GM & G 104 at 109 per Turner LJ; *Luther v Bianconi* (1860) 10 I Ch R 194 at 205; *Re Tempest*(1866) 1 Ch App 485 at 487-488 per Turner LJ; *Re Atkins, Newman v Sinclair* (1899) 81 LT 421; *Cowan v Scargill*[1985] Ch 270, [1984] 2 All ER 750 (duty of pension fund trustees); *Lloyds Bank plc v Duker*[1987] 3 All ER 193, [1987] 1 WLR 1324 (distribution of shares left by will); *Edge v Pensions Ombudsman* [2000] Ch 602, [1999] 4 All ER 546, CA (pension fund trustees duty to act impartially explained).

3 *Scott v National Trust for Places of Historic Interest or Natural Beauty*[1998] 2 All ER 705, sub nom *Ex p Scott* [1998] 1 WLR 226.

4 *Simpson v Bathurst, Shepherd v Bathurst*(1869) 5 Ch App 193 at 202 per Lord Hatherley LC; *Ellis v Barker*(1871) 7 Ch App 104.

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## (D) DUTY TO ACT PERSONALLY

### 952. Duty to act personally.

The traditional principle of equity that a trustee should exercise his judgment<sup>1</sup> and perform his duties<sup>2</sup> personally<sup>3</sup> has been substantially modified both by case law<sup>4</sup> and statute<sup>5</sup>. Trustees now have very wide powers to delegate and appoint agents, nominees and custodians<sup>6</sup>.

1 *A-G v Scott* (1750) 1 Ves Sen 413 at 417-418 per Lord Hardwicke LC; *Taylor v Tabrum* (1833) 6 Sim 281; *Robson v Flight* (1865) 4 De GJ & Sm 608 at 613; *Luke v South Kensington Hotel Co* (1879) 11 ChD 121, CA; *Re Parry, Dalton v Cooke* [1969] 2 All ER 512, [1969] 1 WLR 614. A trustee may, however, consult with the beneficiaries, if he does not surrender the ultimate exercise of his own judgment: *Fraser v Murdoch* (1881) 6 App Cas 855 at 864, HL, per Lord Selborne LC. See also *A-G v Scott* (1750) 1 Ves Sen 413; *Offen v Harman* (1859) 1 De GF & J 253; *Re Hetling and Merton's Contract* [1893] 3 Ch 269 at 280, CA, per Lindley LJ; *Re Airey, Airey v Stapleton* [1897] 1 Ch 164. As to obtaining the direction of the court see PARA 1074 post.

2 *Chambers v Minchin* (1802) 7 Ves 186 at 196; *Adams v Clifton* (1862) 1 Russ 297; *Wood v Weightman* (1872) LR 13 Eq 434; *Re Bellamy and Metropolitan Board of Works* (1883) 24 ChD 387, CA; *Robinson v Harkin* [1896] 2 Ch 415 at 422. As to a trustee's disability to delegate the power to lease or sell the trust property see *Hardwick v Mynd* (1793) 1 Anst 109 at 110; *Hawkins v Kemp* (1803) 3 East 410 at 427; *Oliver v Court* (1820) 8 Price 127 at 166-167. As to a trustee's liability where he allows the trust property to remain in the custody or under the control of another person see *Scurfield v Howes* (1790) 3 Bro CC 90; *Hanbury v Kirkland* (1829) 3 Sim 265; *Trutch v Lamprell* (1855) 20 Beav 116; *Candler v Tillett* (1855) 22 Beav 257; *Thompson v Finch* (1856) 8 De GM & G 560; *Lewis v Nobbs* (1878) 8 ChD 591; *Re C Flower and Metropolitan Board of Works, Re M Flower and Metropolitan Board of Works* (1884) 27 ChD 592 at 596 per Kay J. There can also be liability where trust property is left in the sole possession of a co-trustee: *Gregory v Gregory* (1836) 2 Y & C Ex 313; *Ghost v Waller* (1846) 9 Beav 497; *Waugh v Wyche* (1854) 2 Drew 318 at 326 per Kindersley V-C; *Browne v Butter* (1857) 24 Beav 159; *Robinson v Harkin* [1896] 2 Ch 415; *Carruthers v Carruthers* [1896] AC 659, HL. See also PARAS 959 ante, 1003 post.

3 A trustee may not allow a stranger to participate in the management or control of the trust: *Salway v Salway* (1831) 2 Russ & M 215 at 219 per Lord Brougham LC; *White v Baugh* (1835) 3 Cl & Fin 44, HL; *Kingham v Lee* (1846) 15 Sim 396 at 399-400 per Shadwell V-C; *Pearce v Pearce* (1856) 22 Beav 248. Where trust property is sold with other property, the purchase money must be apportioned before completion of the purchase, and the amount attributable to the trust property must be separately paid to the trustees: *Re Cooper and Allens Contract for Sale to Harlech* (1876) 4 ChD 802 at 815 per Jessel MR. Where a trustee is one of several trustees he may not escape responsibility by leaving a matter to his co-trustee: *Brice v Stokes* (1805) 11 Ves 319; *Langford v Gascoyne* (1805) 11 Ves 333; *Underwood v Stevens* (1816) 1 Mer 712; *Re Chertsey Market, ex p Walthew* (1819) 6 Price 261 at 285 per Richards CB; *Oliver v Court* (1820) 8 Price 127 at 166-167; *Re Dixon, ex p Griffin* (1826) 2 Gl & J 114 at 116; *Clough v Bond* (1838) 3 My & Cr 490 at 497; *Bulteel v Lord Abinger* (1842) 6 Jur 410; *Cowell v Gatcombe* (1859) 27 Beav 568; *Robinson v Harkin* [1896] 2 Ch 415. If he leaves a matter to his co-trustee or agent he remains liable to his beneficiary for the conduct of his co-trustee or agent: *Re Earl of Litchfield and Williams* (1737) 1 Atk 87; *Chambers v Minchin* (1802) 7 Ves 186 at 196; *Re French, ex p Townsend* (1828) 1 Mol 139; *Hanbury v Kirkland* (1829) 3 Sim 265; *Bacon v Clark* (1836) 3 My & Cr 294; *Turner v Corney* (1841) 5 Beav 515 at 517 per Lord Langdale MR; *Egbert v Butter* (1856) 21 Beav 560; *Bostock v Floyer* (1865) LR 1 Eq 26; *Hopgood v Parkin* (1870) LR 11 Eq 74; *Rodbard v Cooke* (1877) 25 WR 555; *Davis v Hutchings* [1907] 1 Ch 356 at 365 per Kekewich J.

4 A trustee is not liable for the act of his co-trustee or agent where the law allows him to transact the affairs of the trust through a co-trustee or responsible agent: *Re Speight, Speight v Gaunt* (1883) 22 ChD 727 at 762, CA, per Lindley LJ (affd (1883) 9 App Cas 1, HL); *Re Weall, Andrews v Weall* (1889) 42 ChD 674; *Shepherd v Harris* [1905] 2 Ch 310; *Re Lucking's Will Trusts, Renwick v Lucking* [1967] 3 All ER 726, [1968] 1 WLR 866. As to the non-statutory powers to appoint and use agents see PARA 1001 et seq post. Where the trust instrument provides express authority to do so, a trustee may delegate his powers: *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622 at 639 and 630, HL, per Viscount Radcliffe.

5 See the Trustee Act 1925 s 23(3) (repealed, but with a saving for appointments made under s 23 before 1 February 2001), s 25 (as substituted); the Trusts of Land and Appointment of Trustees Act 1996 s 9 (as amended); the Trustee Delegation Act 1999 s 1; the Trustee Act 2000 Pt IV (ss 11-27).

6 See PARA 984 et seq post.

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### 953. Unanimity.

Except in the case of charitable trusts<sup>1</sup> and pension trusts<sup>2</sup>, trustees must generally<sup>3</sup> act unanimously in any transaction affecting the trust property, and a majority cannot bind the minority<sup>4</sup>. Thus a receipt for money given by one of two trustees will not be a discharge<sup>5</sup>. A subsequent approval by one trustee of the exercise of a discretion by the other seems, however, to be sufficient<sup>6</sup>; and a notice of intention to renew a lease is good if given to one of two trustees<sup>7</sup>.

1 In the case of charity trustees the acts of the majority may bind the minority: *Re Whiteley, Bishop of London v Whiteley* [1910] 1 Ch 600. See also PARA 630 note 1 ante; and CHARITIES vol 8 (2010) PARA 380.

2 Decisions of the trustees of an occupational pension trust scheme may, unless the scheme provides otherwise, be taken by agreement of a majority of the trustees: see the Pensions Act 1995 s 32(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 790.

3 As to the power of a majority of trustees to lodge money in court see PARA 918 ante. The trust instrument may expressly authorise a majority to bind the minority: *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483.

4 *Leyton v Sneyd* (1818) 8 Taunt 532; *Luke v South Kensington Hotel Co* (1879) 11 ChD 121 at 125-126, CA, per Jessel MR; *Tempest v Lord Camoys* (1882) 21 ChD 571, CA; *Re C Flower and Metropolitan Board of Works, Re M Flower and Metropolitan Board of Works* (1884) 27 ChD 592; *Astbury v Astbury* [1898] 2 Ch 111 at 115-116 per Stirling J. As to proof in bankruptcy by trustees see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 524. Where there is a trust for sale, with discretionary power to postpone the sale, the sale must take place unless all the trustees agree to its postponement: *Re Roth, Goldberger v Roth* (1896) 74 LT 50. A sale must take place unless the trustees unanimously agree to a postponement not only where the instrument creating the trust contains an express trust for sale, but also where a statutory trust for sale arises, and even a majority of trustees will be directed, in the case of land, to concur in an immediate sale: *Re Mayo, Mayo v Mayo* [1943] Ch 302, [1943] 2 All ER 440. This principle will not, however, prevail where the trust itself or the circumstances in which it was made show that there was a secondary or collateral object besides that of sale: see *Jones v Challenger* [1961] 1 QB 176 at 181, [1960] 1 All ER 785 at 787, CA (where it was held not inequitable that one of two trustees for sale who had been husband and wife but who were divorced should wish the matrimonial home to be sold, and the court ordered a sale). A power to postpone sale is now implied in the case of every trust for sale of land created by a disposition, whenever it was created or arose, despite any provision to the contrary made by the disposition (see the Trusts of Land and Appointment of Trustees Act 1996 s 4; and SETTLEMENTS vol 42 (Reissue) PARA 903), and all trusts for sale of land implied by statute have been converted into trusts of land, under which there is no duty to sell the land (see s 5, Sch 2; and SETTLEMENTS vol 42 (Reissue) PARA 903). A trust for sale of land is now subsumed under a trust of land: see ss 1, 4, 5; para 605 note 5 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 66. For the meaning of 'trust of land' see PARA 605 note 5 ante. There is nothing in the Trusts of Land and Appointment of Trustees Act 1996 to affect the rule that trustees of a private trust must act unanimously. See also *Re Evers's Trust, Papps v Evers* [1980] 3 All ER 399, [1980] 1 WLR 1327, CA; *Re Holliday (a bankrupt), ex p Trustee of the Property of the Bankrupt v Holliday* [1981] Ch 405, [1980] 3 All ER 385, CA; *Re Lowrie (a bankrupt), ex p the Trustee of the Bankrupt v The Bankrupt* [1981] 3 All ER 353; *Bernard v Josephs* [1982] Ch 391, [1982] 3 All ER 162, CA; *Chhokar v Chhokar* [1984] FLR 313 at 323, CA; *Re Citro (a bankrupt)* [1991] Ch 142, [1990] 3 All ER 952, CA; *Lloyds Bank plc v Byrne and Byrne* [1993] 1 FLR 369, CA; *Abbey National plc v Moss* [1994] 2 FCR 587, [1994] 1 FLR 307, CA.

5 *Lee v Sankey* (1873) LR 15 Eq 204. See also *Walker v Symonds* (1818) 3 Swan 1 at 63; *Hall v Franck* (1849) 11 Beav 519. As to the inability of a sole trustee other than a trust corporation to give a valid receipt for certain purposes see PARA 799 ante. An acknowledgment by one of two trustees was held insufficient to prevent time running under a former limitation enactment which required any acknowledgment to be signed personally by the party to be sued and contained no provision as to signature by an agent: *Richardson v Younge* (1871) 6 Ch App 478. An acknowledgment may now in all cases be signed by the maker or his agent: see the Limitation Act 1980 s 30; and LIMITATION PERIODS vol 68 (2008) PARA 1185.

6     *Messeena v Carr* (1870) LR 9 Eq 260 at 262-263 per Romilly MR.

7     *Nicholson v Smith* (1882) 22 ChD 640.

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## **(ii) Duty to administer the Trust according to its Terms**

### **954. Duty of loyalty.**

The distinguishing obligation of a trustee is the obligation of loyalty<sup>1</sup>. A trustee must not connive at or knowingly facilitate any act or conduct of another person which would involve a breach of trust or occasion loss or risk to the trust property<sup>2</sup>. He must not set up or abet an adverse title or claim of another person against his beneficiaries<sup>3</sup>, or undertake a duty or put himself in a position which is inconsistent with his duty as trustee<sup>4</sup>, or act in a manner inconsistent with that duty<sup>5</sup>.

1 The core obligation of loyalty encompasses inter alia: (1) the duty to act in good faith; (2) the trustee's disability to profit from his trust; (3) the trustee's duty to avoid conflict between his duty and his personal interest; (4) the trustee's disability to act for his own benefit or the benefit of a third person without the informed consent of his principal; and (5) the duty of fair dealing: see *Bristol and West Building Society v Mothew*[1998] Ch 1 at 18, [1996] 4 All ER 698 at 712, CA, per Millett LJ. See also PARA 926 et seq ante.

2 *Head v Gould*[1898] 2 Ch 250 at 268-269 per Kekewich J. If a trustee retires from the trust knowing or suspecting that the trustees after his retirement will commit a breach of trust, he is equally liable with them for any loss to the trust estate resulting from it: see PARA 894 ante.

3 *Jevon v Bush* (1685) 1 Vern 342; *Armstrong d Tinker v Peirse* (1766) 3 Burr 1898; *Kaye v Powel* (1791) 1 Ves 408; *Shine v Gough* (1811) 1 Ball & B 436 at 445 per Manners LC; *Newsome v Flowers* (1861) 30 Beav 461 at 470; *Neligan v Roche*(1873) IR 7 Eq 332 at 337. See also *Twigg and Franks v Mason* (1916) 50 ILT 173, HL (where an action by a trustee for the benefit of a person whose interest was hostile to that of beneficiaries entitled to six-sevenths of the trust property was held to be improper). A person who has accepted property as a trustee and held it as such is not afterwards at liberty to turn round upon those by whom or for whom he has been entrusted with the possession of the trust property and say that the donor had no title to it: *Neligan v Roche* supra at 337.

4 *Earl Talbot v Hope Scott* (1858) 4 K & J 139; *Bray v Ford*[1896] AC 44 at 51, HL, per Lord Herschell. For the rule that a trustee must not place himself in a position where his interest conflicts with his duty see PARA 927 ante.

5 *Crosskill v Bower, Bower v Turner* (1863) 32 Beav 86. A trustee 'must put his own interests entirely out of the question': *Cook v Collingridge* (1823) Jac 607 at 621 per Lord Eldon LC. See PARA 941 ante.

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### **955. Duty to administer the trust according to its terms.**

A trustee must strictly conform to and carry out the terms of the trust<sup>1</sup>, so far as they are for the time being in force<sup>2</sup>, and must perform the duties which are attached by law to the administration of the trust<sup>3</sup>.

Where a trustee acts properly with reference to the facts and circumstances which exist at the time when he acts, and which are known or ought to have been known by him at the time, he is not liable if, owing to circumstances which subsequently occur, his action causes a loss to some of the beneficiaries<sup>4</sup>.

The fact of a trust being administered by the court does not absolve the trustee from his duties with respect to it<sup>5</sup>.

1 As to a trustee's duty to acquaint himself with the terms of the trust see PARA 958 post.

2 *A-G v Lady Downing* (1767) Wilm 1 at 23-24 per Wilmot LJ; *Booth v Booth* (1838) 1 Beav 125 at 128-129; *Knott v Cottee* (1852) 16 Beav 77; *Raby v Ridehalgh* (1855) 7 De GM & G 104 at 108 per Turner LJ; *Devaynes v Robinson* (1857) 24 Beav 86; *Leedham v Chawner* (1858) 4 K & J 458; *Re Massingberd's Settlement, Clark v Trelawney* (1890) 63 LT 296 at 298, CA. Unless he is authorised to do so by the instrument creating the trust or by statute, a trustee may not make a gift or voluntary payment out of the trust property: see *Re Clore's Settlement Trusts, Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955; and GIFTS vol 52 (2009) PARA 214. See also PARA 1084 post.

3 *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469 at 475-476 per Jessel MR. Not every trustee has the same duties and liabilities: *Earl of Egmont v Smith, Smith v Earl of Egmont* supra at 475.

4 *Re Hurst, Addison v Topp* (1892) 67 LT 96 at 99, CA, per Lindley LJ; *Rawsthorne v Rowley* [1909] 1 Ch 409n, CA; cf *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558.

5 *Garner v Moore* (1855) 3 Drew 277.



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## 956. Payment of income and capital to persons entitled.

It is the duty of a trustee to pay the income and the capital of the trust property to the persons who are entitled to them respectively<sup>1</sup>. Where he is in doubt as to who these persons are, the trustee should apply to the court for its direction on the subject<sup>2</sup>. An alternative practical solution to the problem of a missing beneficiary, particularly in the case of a small trust, may be to take out missing beneficiary insurance<sup>3</sup>. The trustee is liable if he wilfully or negligently or through a mistake on a point of law pays to the wrong person<sup>4</sup>, and may be held liable even if he is induced by forgery or fraud to do so<sup>5</sup>, although relief may be available to the trustee by statute<sup>6</sup>. Further, as between the trustee and a person who is wrongly paid, the trustee, under the law of restitution based on the principle of unjust enrichment, has a right to recover the payment if it was paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution such as the defence of change of position<sup>7</sup>. The trustee is not, however, liable if he pays to a beneficiary originally entitled where he had no notice of the derivative title of the person actually entitled, provided that his ignorance of it is not due to any negligence on his part<sup>8</sup>. In other cases, ignorance of the true facts may relieve him from liability for payment to the wrong person<sup>9</sup>.

If a trustee, without knowledge<sup>10</sup> of the revocation of a power of attorney, deals with the donee of the power, the transaction between them is, in favour of the trustee, as valid as if the power had then been in existence<sup>11</sup>. If the power is expressed in the instrument creating it to be irrevocable and to be given by way of security, then, unless the trustee knew that it was not in fact given by way of security, he is entitled to assume that the power is incapable of revocation except by the donor acting with the donee's consent, and he is treated as having knowledge of the revocation only if he knows that it has been revoked in that manner<sup>12</sup>.

1 See eg *Watts v Turner* (1830) 1 Russ & M 634; *Willis v Hiscox* (1839) 4 My & Cr 197; *Hampshire v Bradley* (1845) 2 Coll 34; *Firmin v Pulham* (1848) 2 De G & Sm 99; *Warter v Anderson* (1853) 11 Hare 301 at 303 per Wood V-C; *Sporle v Barnaby* (1864) 10 Jur NS 1142; *Southwell v Martin* (1869) 21 LT 135; *Re Hulkes, Powell v Hulkes* (1886) 33 ChD 552; *Re Bennison, Cutler v Boyd* (1889) 60 LT 859; *Low v Bouverie* [1891] 3 Ch 82 at 99, CA, per Lindley LJ; *Davis v Hutchings* [1907] 1 Ch 356; *Re Ruddock, Newberry v Mansfield* (1910) 102 LT 89, CA. Payment should be made without demand: *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353. A trustee is entitled to full information as to who are entitled to the trust property: *Burrows v Greenwood* (1840) 4 Y & C Ex 251; *Holford v Phipps* (1841) 3 Beav 434; *Hurst v Hurst* (1874) 9 Ch App 762 at 766 per James LJ. A trustee distributing trustee property should inquire as to the value of the securities distributed: see *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558. As to the duty of trustees to inquire whether the produce of sub-units in a fixed investment trust is capital or income see *Re Whitehead's Will Trusts, Public Trustee v White* [1959] Ch 579, [1959] 2 All ER 497. As to appropriating specific portions of the trust property to individual beneficiaries see PARA 1056 post; and as to paying out their specific shares from time to time as they become entitled in possession see PARA 951 ante.

2 *Talbot v Earl of Radnor* (1834) 3 My & K 252; *Neale v Davies* (1854) 5 De GM & G 258; *Merlin v Blaggrave* (1858) 25 Beav 125 at 137-138 per Romilly MR. A trustee may in some cases be protected by legal advice in paying a trust fund to the wrong person: *Re Allsop, Whittaker v Bamford* [1914] 1 Ch 1, CA; but see *Boulton v Beard* (1853) 3 De GM & G 608; *Davis v Hutchings* [1907] 1 Ch 356 at 365; and PARA 948 ante.

3 See *Re Evans* [1999] 2 All ER 777.

4 *Hopkins v Myall* (1830) 2 Russ & M 86; *Hodgson v Hodgson* (1837) 2 Keen 704; *Hutchins v Hutchins* (1851) 15 Jur 869; *Harrison v Randall* (1851) 9 Hare 397 at 407 per Turner V-C; *Boulton v Beard* (1853) 3 De GM & G 608; *Wright v Chard* (1860) 1 De GF & J 567; *Barratt v Wyatt* (1862) 30 Beav 442; *Mackechnie v Marjoribanks* (1870) 39 LJ Ch 604; *Hilliard v Fulford* (1876) 4 ChD 389; *Re Ward, Bemment v Balls* (1878) 47 LJ Ch 781; *Re*

*Hulkes, Powell v Hulkes* (1886) 33 ChD 552. A trustee is liable if under a power of advancement he applies trust money in a manner which results in no real benefit to the minor: *Simpson v Brown* (1865) 11 LT 593. As to the power of advancement generally see PARA 1050 post.

5 *Ashby v Blackwell* (1765) 2 Eden 299 at 302 per Lord Northington LC; *Eaves v Hickson* (1861) 30 Beav 136; *Bostock v Floyer* (1865) LR 1 Eq 26; *Sutton v Wilders* (1871) LR 12 Eq 373; *Re Bennison, Cutler v Boyd* (1889) 60 LT 859; *Re Neil, Hemming v Neil* (1890) 62 LT 649; *Davis v Hutchings* [1907] 1 Ch 356. A trustee who paid trust money to a minor on a false representation by him and his father that he was of age was held not liable to pay it again after the beneficiary had actually come of age: *Overton v Banister* (1844) 3 Hare 503.

6 If under the Trustee Act 1925 s 61: see PARA 1123 post. In appropriate circumstances the court may make an order enabling trustees to distribute on the footing that a theoretical beneficiary has predeceased the testator: *Re Benjamin* [1902] 1 Ch 723; *Re Green's Will Trusts* [1985] 3 All ER 455.

7 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL, reversing the rule that money is not recoverable in restitution on the ground that it was paid under a mistake of law; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. As to restitution on the ground of mistake see RESTITUTION vol 40(1) (2007 Reissue) PARA 28 et seq; and as to defences see RESTITUTION vol 40(1) (2007 Reissue) PARA 165 et seq.

8 *Cothay v Sydenham* (1788) 2 Bro CC 391; *Leslie v Baillie* (1843) 2 Y & C Ch Cas 91; *Re Cull's Trusts* (1875) LR 20 Eq 561 at 563 per Jessel MR; *Williams v Williams* (1881) 17 ChD 437; *Re Long, Lovegrove v Long* [1901] WN 166; *Davis v Hutchings* [1907] 1 Ch 356. Ignorance does not excuse if it is due to non-examination of the trust papers: *Hallows v Lloyd* (1888) 39 ChD 686 at 691 per Kekewich J.

9 *Cothay v Sydenham* (1788) 2 Bro CC 391; *Williams v Williams* (1881) 17 ChD 437. Notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust, the trustees, before conveying to or distributing among the beneficiaries any real or personal property, may protect themselves by means of advertisements: see the Trustee Act 1925 s 27 (as amended); and PARA 915 ante. See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 382-383.

10 Knowledge of the revocation of a power of attorney includes knowledge of the occurrence of any event (such as the donor's death) which has the effect of revoking the power: see the Powers of Attorney Act 1971 s 5(5); and AGENCY vol 1 (2008) PARA 193.

11 See *ibid* s 5(2); and AGENCY vol 1 (2008) PARA 193. This does not prejudice the right against the donee of any other person entitled to the distributed property. See further AGENCY vol 1 (2008) PARA 193.

12 See *ibid* s 5(3); and AGENCY vol 1 (2008) PARA 193.

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### **957. Impartiality in relation to payment of income and capital.**

Notwithstanding his duty to act impartially between beneficiaries<sup>1</sup>, a trustee may pay out the share of a beneficiary who has attained a vested interest in possession, even though the shares of other beneficiaries have not so vested, or, by reason of incapacity or of the trusts attaching to them, are not presently payable<sup>2</sup>, if he retains assets which on a fair valuation are then sufficient to answer those other shares<sup>3</sup>. Where the distribution is in the form of investments rather than cash, the beneficiary will normally be treated as having received the cash value of the investments<sup>4</sup>. This amount will be brought into account if the beneficiary is entitled to a larger share on the final division of the trust assets, but as, in times of inflation, this can lead to capricious results, it may be fairer to treat appropriations and advances as fractional distributions of entitlement<sup>5</sup>.

1 See PARA 951 ante.

2 Where beneficiaries are entitled to share a fund as joint tenants, a beneficiary whose share is presently payable is entitled to be paid his share of income even though not all the beneficiaries are presently entitled to payment of their shares and even though there has been no severance of the capital of the fund: *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353.

3 *Fenwick v Clarke* (1862) 4 De GF & J 240; *Re Winslow, Frere v Winslow* (1890) 45 ChD 249; *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA; *Re Hurst, Addison v Topp* (1892) 67 LT 96 at 99, CA, per Lindley LJ. It is obvious that, in some cases, owing to subsequent depreciation or loss of the retained funds, such a payment may result in an unequal treatment of those other beneficiaries, and this is an exception from the general rule that the rights of a beneficiary cannot be affected by the act of his trustee: see *Re Swan* (1864) 2 Hem & M 34 at 37 per Wood V-C.

4 *Re Gollin's Declaration of Trust, Turner v Williams* [1969] 3 All ER 1591, [1969] 1 WLR 1858.

5 *Re Leigh's Settlement Trusts* [1981] CLY 2453 (where the court gave the trustees leave to appropriate a farm not at its value at the time but as having a value amounting to a fraction of the whole trust fund). Where there is a power to make advances up to a specified proportion of a trust fund, a payment up to that limit exhausts the exercise of the power and it ceases to be exercisable in the future even though the retained assets increase in value: *Re Marquess of Abergavenny's Estate Act Trusts, Marquess of Abergavenny v Ram* [1981] 2 All ER 643, [1981] 1 WLR 843.

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### **(iii) Knowledge and Control of Trust Affairs and Property**

#### **958. Acquaintance with trust and its affairs.**

The first duty of a trustee is to acquaint himself with the terms of the trust under which he acts<sup>1</sup>, with the state of the trust property<sup>2</sup>, and with the contents of all the deeds, notices and other documents and papers relating to or affecting the trust property which come into his possession or under his control<sup>3</sup>.

A trustee must assume the validity of the title of his beneficiaries, even if it is doubtful, until it is actually negated<sup>4</sup>. At the same time, he has a right to know the title of those who pretend to be his beneficiaries<sup>5</sup>, and, if he receives notice of an adverse claim and of an intention to hold him liable if he disregards it, he may obtain a decision of the court as to his course of action<sup>6</sup>.

1 *Hallows v Lloyd*(1888) 39 ChD 686 at 691 per Kekewich J. A trustee is not liable for failing to act in a trust which has never been brought to his notice: *Youde v Cloud*(1874) LR 18 Eq 634.

2 *Harvey v Olliver* (1887) 57 LT 239 at 241 per Kay J; *Hallows v Lloyd*(1888) 39 ChD 686; *Nestle v National Westminster Bank plc*[1994] 1 All ER 118, [1993] 1 WLR 1260, CA.

3 *Hallows v Lloyd*(1888) 39 ChD 686 at 691. When new trustees are appointed, they are not, however, bound to inquire of retiring trustees whether they have received notice of any incumbrance on, or other dealing with, the trust property: *Hallows v Lloyd* supra; *Phipps v Lovegrove*, *Prosser v Phipps*(1873) LR 16 Eq 80 at 90 per James LJ. Any written notices in fact received must be handed over to the new trustees: *Re Booth's Settlement Trusts* (1853) 1 WR 444. See also *Tiger v Barclays Bank Ltd*[1952] 1 All ER 85, CA.

4 *Beddoes v Pugh* (1859) 26 Beav 407 at 417; *Neligan v Roche* (1873) 7 IR Eq 332.

5 *Hurst v Hurst*(1874) 9 Ch App 762 at 766 per James LJ.

6 *Neale v Davies* (1854) 5 De GM & G 258 at 263 per Turner LJ (affg the decision of Wood V-C); cf *Neale v Davies* supra at 264-265 per Knight Bruce LJ. As to the application to the court when a trustee is in doubt as to the persons entitled see PARA 956 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(iii) Knowledge and Control of Trust Affairs and Property/959. Trustee's duty to take possession of trust property and preserve it.

### **959. Trustee's duty to take possession of trust property and preserve it.**

A trustee must take all reasonable and proper measures to obtain possession of the trust property if it is outstanding<sup>1</sup>, and to get in all debts and funds due to the trust estate<sup>2</sup>, and to preserve it<sup>3</sup> and secure it from loss<sup>4</sup> or risk of loss<sup>5</sup>. Unless otherwise directed or authorised by the instrument creating the trust, he has a duty to get in trust property invested in a hazardous manner<sup>6</sup>.

Where a trustee has taken reasonable precautions, he is not liable if the trust property is stolen or lost without default on his part while it is in his possession<sup>7</sup>.

1 *Powell v Evans* (1801) 5 Ves 839; *Mucklow v Fuller* (1821) Jac 198; *Gregory v Gregory* (1836) 2 Y & C Ex 313; *Fenwick v Greenwell* (1847) 10 Beav 412; *Styles v Guy* (1849) 1 Mac & G 422; *M'Gachen v Dew, Dew v M'Gachen* (1851) 15 Beav 84; *Story v Gape* (1856) 2 Jur NS 706; *Taylor v Millington* (1858) 4 Jur NS 204; *Grove v Price* (1858) 26 Beav 103; *Westmoreland v Holland* (1871) 23 LT 797; *Re Pilling, ex p Ogle, ex p Smith* (1873) 8 Ch App 711 at 717. As to the duty of all the trustees, where there are several, to possess themselves of the trust property see PARA 952 post; and as to the custody of securities and documents of title see PARA 729 ante. The trust property need not be vested in the trustee so long as it is under his control.

2 *Lowson v Copeland* (1787) 2 Bro CC 156; *Gregory v Gregory* (1836) 2 Y & C Ex 313; *Wiles v Gresham* (1854) 2 Drew 258; *Orrett v Corser, Corser v Orrett* (1855) 21 Beav 52 at 56 per Romilly MR; *Re Strahan, ex p Geaves* (1856) 8 De GM & G 291; *Re Brogden, Billing v Brogden* (1888) 38 ChD 546, CA. The trustee may, however, exercise a reasonable discretion as to the time for so doing: *Buxton v Buxton* (1835) 1 My & Cr 80; *Rowley v Adams* (1849) 2 HL Cas 725. He must not allow rent or interest to fall into arrear: *Tebbs v Carpenter* (1816) 1 Madd 290 at 297-298. Unless expressly authorised to forbear doing so, he must enforce a bond or covenant in favour of the trust estate entered into by the creator of the trust: *Luther v Bianconi* (1860) 10 I Ch R 194; *Woodhouse v Woodhouse* (1869) LR 8 Eq 514 at 520 per Stuart V-C; *Re Brogden, Billing v Brogden* supra. For a broad power to compromise claims, however, see the Trustee Act 1925 s 15(f); and PARA 1052 post. In *Re Pryce, Nevill v Pryce* [1917] 1 Ch 234, the court authorised trustees to abstain from enforcing a covenant for the benefit only of next of kin claiming as volunteers. The next of kin as third parties may now be able to bring proceedings under the Contracts (Rights of Third Parties) Act 1999: see PARA 662 ante. See also *Re Kay's Settlement, Broadbent v Macnab* [1939] Ch 329, [1939] 1 All ER 245. A trustee's duty to preserve trust assets does not compel him to seek recovery of a loan made under a power to make beneficial loans to beneficiaries: *Chirkinian v Larcom Trustees Ltd* [2006] EWHC 1917 (Ch), [2006] All ER (D) 403 (Jul).

3 See, however, *Harris v Black* (1983) 46 P & CR 366, CA (cited in note 4 infra).

4 *Sutton v Wilders* (1871) LR 12 Eq 373; *Kingdon v Castleman* (1877) 25 WR 345; *Briggs v Massey* (1882) 51 LJ Ch 447, CA; *Low v Bouverie* [1891] 3 Ch 82 at 99, CA, per Lindley LJ. See also PARA 952 post. Where two persons held leasehold property on the statutory trusts for sale, the court had jurisdiction to order one trustee to join his co-trustee in serving a counter-notice and applying for a new lease: see *Harris v Black* (1983) 46 P & CR 366, CA (where the court did not make such an order as there were no other beneficiaries involved).

5 *Macnamara v Carey* (1867) IR 1 Eq 9, Ir CA; *Cleary v Fitzgerald* (1881) 7 LR Ir 229 at 247, Ir CA, per May CJ; *Bullock v Bullock* (1886) 56 LJ Ch 221.

Except in the case of trusts having a custodian trustee or in relation to any securities vested in the official custodian for charities, trustees who retain or invest in bearer securities must appoint a person to act as a custodian of the securities and the appointment must be evidenced in writing: see the Trustee Act 2000 s 17. As to the power to invest in bearer securities see the general power of investment contained in Trustee Act 2000 s 3(1); and PARA 1012 post. As to the power to appoint custodians see PARA 991 post. Where the trust property consists of chattels, an inventory of them ought to be made and kept: *Temple v Thring* (1887) 56 LJ Ch 767. As to investing trust money see PARAS 968, 1007 et seq post. As to insuring buildings see PARAS 1047-1048 post. As to leaving trust money in a bank see *Anon* (1774) Lofft 493; *Adams v Claxton* (1801) 6 Ves 226; *France v Woods* (1829) Tam 172; *Macdonnell v Harding* (1834) 7 Sim 178; *Brown v Clark* (1837) 1 Jur 838; *Lunham v Blundell* (1857) 27 LJ Ch 179; *Gough v Etty* (1869) 20 LT 358; and PARAS 968-969 post.

6 *Kirkman v Booth* (1848) 11 Beav 273 (property left in business carried on by testator in partnership with son). See also PARA 968 post.

7 *Jones v Lewis* (1751) 2 Ves Sen 240; *Job v Job* (1877) 6 ChD 562; *Jobson v Palmer* [1893] 1 Ch 71. As to the statutory protection of a trustee against liability for the default of his agents see PARAS 998-1000 post. A trustee is liable for the loss of title deeds unless he can show that it was due to inevitable accident and not to negligence on his part: *Brown v Sewell* (1853) 11 Hare 49 at 53 per Wood V-C; *Gilligan and Nugent v National Bank Ltd* [1901] 2 IR 513.

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## **960. Bringing and defending proceedings to protect trust property.**

If necessary, a trustee must institute legal proceedings to effect the security of the trust property or its recovery<sup>1</sup>, and, where he has a reasonable prospect of being able to do so successfully, he should defend proceedings brought against him in respect of the trust property<sup>2</sup>. He is not, however, bound to take proceedings with a view to recovering trust property which, due to the financial position of the person liable to restore it or otherwise, would be clearly useless<sup>3</sup>; but, where, by taking proceedings, he could have recovered part of the fund, he is liable to that extent<sup>4</sup>.

Where trust property includes a share or interest, for example a reversionary interest, in property not vested in the trustees, they are not normally chargeable with any breach of trust by reason of any omission to take certain steps or proceedings in relation to that property, but they must obtain a transfer of the trust interest on its falling into possession<sup>5</sup>.

1 *Lowson v Copeland* (1787) 2 Bro CC 156; *Kirby v Mash* (1839) 3 Y & C Ex 295; *Luther v Bianconi* (1860) 10 L Ch R 194; *Macnamara v Carey* (1867) IR 1 Eq 9 at 23-24, Ir CA; *Re Brogden, Billing v Brogden* (1888) 38 ChD 546, CA. As to taking action with reference to a Bill in Parliament affecting the trust property see *Jones v Powell* (1841) 4 Beav 96; and as to the position where a trustee neglects to institute proper legal proceedings see PARA 1082 post.

2 *D'Oechsner v Scott* (1857) 24 Beav 239 at 242; *Benett v Wyndham* (1862) 4 De GF & J 259; *Walters v Woodbridge* (1878) 7 ChD 504, CA; *Re Llewellyn, Llewellyn v Williams* (1887) 37 ChD 317 at 327 per Stirling J.

3 *Ward v Ward* (1843) 2 HL Cas 777n at 784n, 786n, 787n per Lord Lyndhurst LC; *Fenwick v Greenwell* (1847) 10 Beav 412 at 421 per Lord Langdale MR; *Clack v Holland* (1854) 19 Beav 262 at 271-272 per Romilly MR; *Hobday v Peters (No 3)* (1860) 28 Beav 603; *Re Hurst, Addison v Topp* (1892) 67 LT 96, CA; *Millar's Trustees v Polson* (1897) 34 SLR 798 at 804-805. See also *Re Brogden, Billing v Brogden* (1888) 38 ChD 546 at 574, CA, per Lopes LJ. As to releasing or compounding debts or claims, and as to agreeing to a compromise, see PARA 1052 post.

4 *Maitland v Bateman* (1844) 8 Jur 926.

5 See the Trustee Act 1925 s 22(2); and PARA 1053 post.

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#### **(iv) Accounts and Information**

##### **961. Accounts.**

A trustee must keep an accurate account of the trust property<sup>1</sup>, and must be always ready to render it when required<sup>2</sup>.

Subject to any contrary intention expressed in the trust instrument and to the terms of the instrument<sup>3</sup>, trustees may in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and must for that purpose produce such vouchers and give such information to him as he may require<sup>4</sup>.

A beneficiary may challenge the amount paid to or retained by a trustee out of the trust property in respect of costs, charges and expenses incurred by him<sup>5</sup>.

1 *Freeman v Fairlie* (1817) 3 Mer 24 at 42-43 per Lord Eldon LC; *Kemp v Burn* (1863) 4 Giff 348 at 349-350 per Stuart V-C. A trustee who is illiterate and incapable of keeping an account should employ an agent for the purpose: *Wroe v Seed* (1863) 4 Giff 425 at 429 per Stuart V-C. A trustee is personally liable if he neglects to require annual accounts from the manager of the trust estate where those accounts are directed by the instrument creating the trust: *Carruthers v Carruthers*[1896] AC 659, HL. As to preserving a record of the termination of the trust see PARA 753 ante; as to audit of accounts at the expense of the trust see the text and notes 2-5 infra; and as to costs in proceedings for an account see PARA 911 ante.

2 *White v Lady Lincoln, Duke of Newcastle v Kinderley* (1803) 8 Ves 363 at 369-370 per Lord Eldon LC; *Earl of Hardwicke v Vernon* (1808) 14 Ves 504 at 510 per Lord Eldon LC; *Pearse v Green* (1819) 1 Jac & W 135 at 140 per Plumer MR; *Turner v Corney* (1841) 5 Beav 515; *Springett v Dashwood* (1860) 2 Giff 521 at 526 per Stuart V-C; *Kemp v Burn* (1863) 4 Giff 348 at 349-350; *Talbot v Marshfield*(1868) 3 Ch App 622; *Jefferys v Marshall* (1870) 23 LT 548; *Re Hayter, Re Walleth, Hayter v Wells* (1883) 32 WR 26; *Re Skinner, Cooper v Skinner*[1904] 1 Ch 289. A trustee who allows a co-trustee to render an incorrect account is personally liable for the default: *Horton v Brocklehurst (No 2)* (1858) 29 Beav 504. As to the nature of the accounts to be kept in some cases by a solicitor-trustee see LEGAL PROFESSIONS vol 66 (2009) PARA 811-813.

3 See the Trustee Act 1925 s 69(2); and PARA 603 ante.

4 *Ibid* s 22(4). The costs of the examination or audit, including the fee of the auditor, must be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustees in their absolute discretion think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital must be borne by capital and those attributable to income by income: s 22(4). A beneficiary may also apply to the Public Trustee for an audit under the Public Trustee Act 1906 s 13: see PARA 777 et seq ante. As to the Public Trustee see PARA 766 et seq ante.

5 *Re Fish, Bennett v Bennett*[1893] 2 Ch 413 at 423-424, CA, per Bowen LJ, and at 425-426 per Kay LJ.



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## 962. Duty to give information to beneficiary.

A trustee must furnish to a beneficiary, or to a person authorised by him<sup>1</sup>, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is<sup>2</sup> and full accounts respecting it<sup>3</sup>, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder<sup>4</sup>. He must also allow a beneficiary to inspect the trust accounts and all documents relating to the trust<sup>5</sup> save those documents which would reveal the reasons for the exercise of his discretion<sup>6</sup>. It would appear that a trustee is not required to disclose any letter of wishes provided by the settlor to indicate his wishes (though not intended to be legally binding) as regards the exercise of the trustee's discretions but there may be grounds for ordering disclosure in a particular case<sup>7</sup>.

Historically the right to disclosure of trust documents has been regarded as a proprietary right<sup>8</sup> but more recently the approach has been to regard it as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts<sup>9</sup>. Accordingly, the right to disclosure now extends to the objects of a discretionary trust<sup>10</sup> but is a qualified right in that there may be circumstances (especially of confidentiality) in which even a vested and transmissible beneficial interest is not a sufficient basis for requiring disclosure of trust documents<sup>11</sup>.

A trustee has a duty to explain to the beneficiary what his rights are<sup>12</sup>.

If a trustee neglects or fails to provide information and accounts when he ought to do so, he is liable to the costs of proceedings to compel production of the information or accounts<sup>13</sup>. A trustee is, however, entitled to receive from the beneficiary the costs of furnishing the information or accounts, and to require him either to pay those costs in advance or to guarantee their payment<sup>14</sup>.

Indulgence is shown to a trustee from whom an account is demanded after a long lapse of time<sup>15</sup>.

1 *Kemp v Burn* (1863) 4 Giff 348; *Low v Bouverie* [1891] 3 Ch 82 at 99, CA, per Lindley LJ.

2 *Walker v Symonds* (1818) 3 Swan 1 at 58 per Lord Eldon LC; *Clarke v Earl of Ormonde* (1821) Jac 108 at 120 per Lord Eldon LC; *Newton v Askew* (1848) 11 Beav 145 at 152 per Lord Langdale MR; *Thompson v Clive* (1848) 11 Beav 475 at 479; *Springett v Dashwood* (1860) 2 Giff 521 at 528; *Talbot v Marshfield* (1868) 3 Ch App 622 (explained and distinguished in *Re Londonderry's Settlement*, *Peat v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA); *Low v Bouverie* [1891] 3 Ch 82 at 99, CA; *Re Tillott, Lee v Wilson* [1892] 1 Ch 86; *Re Page, Jones v Morgan* [1893] 1 Ch 304 at 309; *Re Dartnall, Sawyer v Goddard* [1895] 1 Ch 474, CA.

3 *Kemp v Burn* (1863) 4 Giff 348; *Wroe v Seed* (1863) 4 Giff 425 at 429 per Stuart V-C. As to reopening accounts in case of error see MISTAKE vol 77 (2010) PARA 78.

4 *Re Tillott, Lee v Wilson* [1892] 1 Ch 86; *Re Dartnall, Sawyer v Goddard* [1895] 1 Ch 474, CA.

5 *Clarke v Earl of Ormonde* (1821) Jac 108; *Gough v Offley* (1852) 5 De G & Sm 653; *Bugden v Tylee* (1856) 21 Beav 545; *Simpson v Bathurst*, *Shepherd v Bathurst* (1869) 5 Ch App 193 at 202 per Lord Hatherley LC; *Re Cowin*, *Cowin v Gravett* (1886) 33 ChD 179. A beneficiary cannot, however, claim inspection of a case laid before counsel by his trustee with a view to resisting the beneficiary's claim: *Thomas v Secretary of State for India in Council* (1870) 18 WR 312. Beneficiaries are not entitled to call on trustee-directors of a company to use their powers as directors as though such powers were held on trust for the beneficiaries and cannot compel the

trustee-directors to disclose information obtained by them in exercise of their powers of inspection as directors (*Butt v Kelson* [1952] Ch 197, [1952] 1 All ER 167, CA), but the beneficiaries may be able to obtain inspection of documents relating to the company in a proper case (*Butt v Kelson* supra). See, however, *Re Whichelow, Bradshaw v Orpen* [1953] 2 All ER 1558, [1954] 1 WLR 5; and COMPANIES vol 15 (2009) PARA 710.

6 Trustees need not disclose their reasons for exercising their discretion and need not allow a beneficiary to inspect documents which will reveal such information eg agenda or minutes of meetings or letters between trustees and a beneficiary or between trustees and a person whose consent is requisite to their exercising a power: *Re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918, [1964] 3 All ER 855, CA. See also *AT & T Istel Ltd v Tully* [1993] AC 45, [1992] 3 All ER 523, HL. The principles of *Re Londonderry's Settlement* supra have been held applicable to pension schemes: *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337. But see *Scott v National Trust for Places of Historic Interest and Natural Beauty* [1998] 2 All ER 705, sub nom *Ex p Scott* [1998] 1 WLR 226, where it was suggested that beneficiaries may be entitled to be given reasons for a change of policy where they have a legitimate expectation that a discretion will be exercised in their favour.

7 There are no English cases on the point but see *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, NSW CA; *Re Rabaiotti's 1989 Settlement* (2000) 2 ITEL 763, Royal Court of Jersey.

8 See *O'Rourke v Darbishire* [1920] AC 581 at 626-627, HL, per Lord Wrenbury; *Re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918 at 937, [1964] 3 All ER 855 at 862, CA, per Salmon LJ.

9 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, [2003] 3 All ER 76; referred to with approval by Lloyd LJ in *Charman v Charman* [2005] EWCA Civ 1606 at [65], [2006] 1 WLR 1053 at [65], [2006] 2 FLR 422 at [65]. As to the right of the High Court and Court of Appeal to follow Privy Council decisions even where they depart from previous Court of Appeal decisions see *Daraydan Holdings v Solland International* [2004] EWHC 622 (Ch), [2005] Ch 119, [2005] 4 All ER 73; *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, sub nom *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] 4 All ER 209; *Abou-Ramah v Abacha* [2006] EWCA Civ 1492, [2007] WTLR 1, [2006] All ER (D) 80 (Nov).

10 *Re Murphy's Settlements* [1998] 3 All ER 1 at 9, sub nom *Murphy v Murphy* [1999] 1 WLR 282 at 290 per Neuberger J; *Chaine-Nickson v Bank of Ireland, Brett and Lewis-Crosby* [1976] IR 393.

11 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, [2003] 3 All ER 76. The Board considered that there were three areas in which the court might have to form a discretionary judgment: (1) whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; (2) what classes of documents should be disclosed, either completely or in redacted form; and (3) what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which might be made of documents or information disclosed under the order of the court: see *Schmidt v Rosewood Trust Ltd* supra at [54].

12 *Burrows v Walls* (1855) 5 De GM & G 233 at 253 per Lord Cranworth LC; *Hawkesley v May* [1956] 1 QB 304, [1955] 3 All ER 353. An executor is not bound to inform a legatee of a legacy: *Re Lewis, Lewis v Lewis* [1904] 2 Ch 656, CA; *Re Mackay, Mackay v Gould* [1906] 1 Ch 25 at 33. For a consideration of the differing obligations of an executor and trustee in this respect see *Hawkesley v May* supra at 322 and 362; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 475. A trustee is not required to give the beneficiary legal advice or inform him of such rights as a right to sever a joint tenancy: *Hawkesley v May* supra.

13 *Springett v Dashwood* (1860) 2 Giff 521; *Kemp v Burn* (1863) 4 Giff 348; *Jefferys v Marshall* (1870) 23 LT 548; *Re Holton's Settlement Trusts, Holton v Holton* (1918) 88 LJ Ch 444.

14 *Re Bosworth, Martin v Lamb* (1889) 58 LJ Ch 432 at 433 per Kekewich J. A legatee under a will has a right to have a satisfactory explanation of the state of the testator's assets and an inspection of the accounts, but he has no right to require a copy of the accounts at the expense of the estate: *Ottley v Gilby* (1845) 8 Beav 602 at 604 per Lord Langdale MR.

15 *Banks v Cartwright* [1867] WN 27; *Payne v Evens* (1874) LR 18 Eq 356 at 363.

## UPDATE

### 962 Duty to give information to beneficiary

NOTE 11--As to the extent to which wish letters are protected by confidentiality see *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2008] 2 All ER (Comm) 62.

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### **963. Duty to give information to successor trustee.**

A retiring trustee is expected to answer his successor's requests for information about the trust and its affairs and is expected to exercise due care in doing so. If through negligence he misleads his successor and loss results to the trust estate he has no defence to a common law claim in negligence<sup>1</sup>.

<sup>1</sup> See *Mond v Hyde* [1999] QB 1097 at 1104, [1998] 3 All ER 833 at 837-838, CA, per Beldham LJ. See also *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85, CA. As to claims in negligence see NEGLIGENCE; TORT.

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## **964. Answering of inquiries by third parties.**

Subject to the payment of costs, a trustee must produce written notices served on him after 31 December 1925 in relation to an equitable interest in real or personal property to any person interested in an equitable interest<sup>1</sup>. With this exception, a trustee is not bound to answer an inquiry by an intending mortgagee or assignee of a beneficiary's interest as to assignments of or incumbrances on that interest<sup>2</sup>.

A person is under a duty of care in answering inquiries only if there is some fiduciary or contractual or other special relationship between him and the person making the inquiries which gives rise to such a duty<sup>3</sup>. If as a matter of courtesy a trustee answers an inquiry, he is not bound to have made previous inquiries of his co-trustees or of the solicitor to the trust, or to do anything more than answer honestly to the best of his actual knowledge and belief<sup>4</sup>. If he does this, he exposes himself to no liability, unless he binds himself by a warranty or so expresses himself as to be estopped from afterwards denying the truth of what he said, or unless in some other way he undertakes a greater responsibility<sup>5</sup>.

<sup>1</sup> See the Law of Property Act 1925 s 137(8); and CHOSER IN ACTION vol 13 (2009) PARA 46. As to notice generally see CHOSER IN ACTION vol 13 (2009) PARA 40 et seq.

<sup>2</sup> *Low v Bouverie* [1891] 3 Ch 82 at 100, CA, per Lindley LJ; *Ward v Duncombe* [1893] AC 369 at 383, HL, per Lord Herschell, and at 393-394 per Lord Macnaghten. See also *Re Tillott*, *Lee v Wilson* [1892] 1 Ch 86 at 88; *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 at 805, 813, [1971] 1 All ER 150 at 157, 160, PC. It is no part of the duty of a trustee to inform a beneficiary of the incumbrances that beneficiary has created or to assist the beneficiary in selling or mortgaging his beneficial interest or in squandering or anticipating his fortune, and a person who proposes to buy or lend money on the beneficiary's interest has no better right than the beneficiary himself: *Low v Bouverie* supra at 99. See also Withers on Reversions (2nd Edn) pp 174-179.

<sup>3</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL. There is no trust or other relationship between a trustee and a third party about to deal with a beneficiary and, although the third party, in making inquiries, may be regarded as authorised by the beneficiary to make them, this does not give him a right to information which the beneficiary himself is not entitled to demand: *Low v Bouverie* [1891] 3 Ch 82 at 99-100, CA.

<sup>4</sup> *Low v Bouverie* [1891] 3 Ch 82 at 100, CA; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1962] 1 QB 396 at 404, [1961] 3 All ER 891 at 895, CA (affd on different grounds [1964] AC 465, [1963] 2 All ER 575, HL); *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793, [1971] 1 All ER 150, PC.

<sup>5</sup> *Burrowes v Lock* (1805) 10 Ves 470; *Derry v Peek* (1889) 14 App Cas 337, HL; *Low v Bouverie* [1891] 3 Ch 82 at 100, CA. A trustee who had signed a memorandum to the effect that he had not received notice of any prior charge on the trust property after having in fact received such a notice, which he had forgotten, was not liable under the memorandum to mortgagees of the trust property who induced him to sign it under the impression that his solicitors had approved of it, whereas they were aware that this was not the case: *Porter v Moore* [1904] 2 Ch 367. It seems that a professional trustee in business as a trustee may be liable where, as a result of the gravity of the inquiry, he appears to give a considered reply: see *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(iv) Accounts and Information/965. Right of beneficiaries to seek information from a third party.

**965. Right of beneficiaries to seek information from a third party.**

Exceptionally, the court, under its equitable jurisdiction, can order a defendant, who is not otherwise an appropriate party to proceedings, to identify the name and address of a third party<sup>1</sup>.

<sup>1</sup> See *Re Murphy's Settlements* [1998] 3 All ER 1, sub nom *Murphy v Murphy* [1999] 1 WLR 282, where the court, in proceedings brought by a discretionary beneficiary, ordered the settlor (who had reserved the power of appointment of trustees) to give the plaintiff information as to the names and addresses of the trustees of the settlement. See also PARA 1071 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(v) Conversion/966. Duty to convert.

## (v) Conversion

### 966. Duty to convert.

It is the duty of a trustee to sell and convert<sup>1</sup> the trust property:

- 187 (1) where the instrument creating the trust directs that it is to be sold and converted<sup>2</sup>;
- 188 (2) where the property consists of hazardous or unauthorised investments<sup>3</sup>; and
- 189 (3) under a residuary bequest of personalty by will, where the property cannot be held to the advantage of beneficiaries for life and in remainder by reason of its being of a wasting nature or of a reversionary nature or otherwise not authorised investments<sup>4</sup>, unless the instrument creating the trust evinces an intention that the wasting property is to be enjoyed in specie<sup>5</sup>.

1 As to the partial abolition of the doctrine of conversion see PARA 967 post.

2 *Re Atkins, Newman v Sinclair* (1899) 81 LT 421; cf *Re Lane, National Gallery of Ireland Governors v A-G* (1918) 52 ILT 60 (where pictures were directed to be sold and the income of the proceeds devoted to purchasing works within a particular category; as the pictures in question were all within that category, they might therefore be retained unsold). Where the instrument directs sale and conversion, the trustee must sell or convert the property within a reasonable period (*Bate v Hooper* (1855) 5 De GM & G 338; *Hughes v Empson* (1856) 22 Beav 181; *Grayburn v Clarkson* (1868) 3 Ch App 605), even though the exact time is left in his discretion (*Sculthorpe v Tipper* (1871) LR 13 Eq 232; *Re Atkins, Newman v Sinclair* supra). The period is ordinarily 12 months (*Bate v Hooper* supra; *Grayburn v Clarkson* supra), but he may be bound to realise the property sooner or be justified in prolonging the period (*Buxton v Buxton* (1835) 1 My & Cr 80; *Paddon v Richardson* (1855) 7 De GM & G 563), and a trust to sell a business with all convenient speed with power to postpone sale has been held to authorise the postponement of the sale for two years (*Re Smith, Arnold v Smith* [1896] 1 Ch 171). A power to postpone sale and conversion authorises the carrying on of a business for a reasonable period: *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42, CA. Notwithstanding the Trusts of Land and Appointment of Trustees Act 1996, the existence of a trust for sale still imposes a mandatory requirement to sell, though there is in every case a power for the trustees to postpone sale of the land without incurring any liability: see the Trusts of Land and Appointment of Trustees Act 1996 s 4; and SETTLEMENTS vol 42 (Reissue) PARA 903. As a consequence of the partial abolition of the doctrine of conversion the interests of the beneficiaries will be interests in land: see s 3; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 230. As to conversion and reconversion of property generally see EQUITY vol 16(2) (Reissue) PARA 701 et seq; TORT.

3 *Hughes v Empson* (1856) 22 Beav 181; *Grayburn v Clarkson* (1868) 3 Ch App 605; *Sculthorpe v Tipper* (1871) LR 13 Eq 232; *Marsden v Kent* (1877) 5 ChD 598, CA; *Earl of Gainsborough v Watcombe Terra Cotta Clay Co Ltd, Dunning v Earl of Gainsborough* (1885) 54 LJ Ch 991 at 996-997; *Re Hazeldine, Public Trustee v Hazeldine* [1918] 1 Ch 433 (postponement of conversion allowed owing to war conditions).

4 See PARA 746 ante. As to income pending sale see PARA 745 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 540; SETTLEMENTS vol 42 (Reissue) PARAS 945-946. As to bequests by will see WILLS.

5 See PARA 746 ante.

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## 967. Discretion as to conversion.

The doctrine of conversion was partially abolished by the Trusts of Land and Appointment of Trustees Act 1996, which provides that where land is held by trustees subject to a trust for sale, the land is not to be regarded as personal property and, where personal property is subject to a trust for sale in order that the trustees may acquire land, the personal property is not to be regarded as land<sup>1</sup>. The abolition applies to trusts whenever they came into being, with the exception of a trust created by the will of a testator who died before 1 January 1997<sup>2</sup>.

A trust for sale is expressly included in the definition of a trust of land in the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup>. A power for the trustees to postpone sale of the land is implied in the case of every trust for sale of land created by a disposition, despite any provision to the contrary; and the trustees are not liable in any way for postponing sale of the land, in the exercise of their discretion, for an indefinite period<sup>4</sup>.

In the case of property other than land, if the instrument creating the trust expressly gives to the trustee a discretion as to conversion or non-conversion of the property, he may exercise it by refraining from conversion<sup>5</sup>. A court of equity does not interfere with such an exercise of his discretion<sup>6</sup>.

1 Trusts of Land and Appointment of Trustees Act 1996 s 3(1). The doctrine of conversion still applies in other situations, eg under a contract for the sale of land: see Pettit *Equity and the Law of Trusts* (10th Edn, 2005) pp 733-735.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 3(2), (3).

3 See *ibid* s 1; and PARA 605 note 5 ante.

4 See *ibid* s 4(1). This applies to a trust whether it is created, or arises, before or after 1 January 1997 (see s 4(2)), but does not affect any liability incurred by trustees before that date (see s 4(3)). The provisions of s 4 replace those of the Law of Property Act 1925 s 25(1), (3) (repealed).

5 *Wrey v Smith* (1844) 14 Sim 202; *Sparling v Parker* (1846) 9 Beav 524; *Johnston v Moore* (1858) 4 Jur NS 356; *Re Sewell's Estate* (1870) LR 11 Eq 80; *Gray v Siggers* (1880) 15 ChD 74; *Re Chancellor, Chancellor v Brown* (1884) 26 ChD 42, CA; *Re Crowther, Midgley v Crowther* [1895] 2 Ch 56; *Re Pitcairn, Brandreth v Colvin* [1896] 2 Ch 199; *Re Schneider, Kirby v Schneider* (1906) 22 TLR 223; *Re Bates, Hodgson v Bates* [1907] 1 Ch 22. See also *Re Marshall, Marshall v Marshall* [1914] 1 Ch 192, CA. As to the treatment of income of property pending conversion see PARA 745 ante; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 540-541; SETTLEMENTS vol 42 (Reissue) PARA 945.

6 *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Re Burrage, Burningham v Burrage* (1890) 62 LT 752; *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379, CA; *Re Steed's Will Trusts* [1960] Ch 407, [1960] 1 All ER 487, CA. Trustees who exercise their discretion by postponing conversion will be presumed to do so properly and are not bound to exercise the discretion in writing or preserve evidence of their exercise of it: *Re Oddy, Connell v Oddy* (1910) 104 LT 128 at 131.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(vi) Investment/968. Duty to invest.

## **(vi) Investment**

### **968. Duty to invest.**

Unless a trustee is expressly otherwise authorised or required under the terms of his trust, he must duly and promptly invest<sup>1</sup> all capital trust money coming to his hands<sup>2</sup>, and all income which cannot be immediately applied for the purposes of the trust<sup>3</sup>; and he is liable for any loss which may result from its being improperly invested<sup>4</sup> or being left uninvested for an unreasonable length of time<sup>5</sup>, and for interest during the period of its being so left<sup>6</sup>. The investment must be made in the name of the trustee<sup>7</sup>, and, if there are several trustees, in the name of all of them<sup>8</sup>, except where, under the conditions of the investment, it may only be made in the name of one<sup>9</sup>, or except where the power to invest in bearer securities<sup>10</sup> applies.

1 As to a trustee's powers of investment see PARA 1007 et seq post.

2 *Cann v Cann* (1884) 51 LT 770. Six months is the maximum period for which it can reasonably be left uninvested: *Cann v Cann* supra at 771 per Kay J.

3 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1140.

4 *Trafford v Boehm* (1746) 3 Atk 440; *Hancom v Allen* (1774) 2 Dick 498 (revsd sub nom *Allen v Hancom* (1775) 7 Bro Parl Cas 375; but no reasoned judgment is reported). As to the investments which are authorised see PARA 1007 et seq post.

5 *Franklin v Frith* (1792) 3 Bro CC 433; *Moyle v Moyle* (1831) 2 Russ & M 710; *Cann v Cann* (1884) 51 LT 770.

6 *Stafford v Fiddon* (1857) 23 Beav 386; *Re Jones, Jones v Searle* (1883) 49 LT 91; *Gilroy v Stephens* (1882) 30 WR 745. As to the liability to pay interest see PARAS 1106-1108 post.

7 *Webb v Jonas* (1888) 39 ChD 660 at 666-667 per Kekewich J; *Field v Field* [1894] 1 Ch 425 at 429 per Kekewich J. As to the statutory power to appoint nominees see the Trustee Act 2000 s 16; and PARA 991 et seq post.

8 *Swale v Swale* (1856) 22 Beav 584; *Lewis v Nobbs* (1878) 8 ChD 591 at 594 per Hall V-C.

9 *Consterdine v Consterdine* (1862) 31 Beav 330 at 334.

10 As to investment in bearer securities see PARA 959 ante.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(vi) Investment/969. Bank accounts.

## 969. Bank accounts.

Where trust money is paid into a trust account at a bank<sup>1</sup>, it remains subject to the trust<sup>2</sup>. Where a fund was standing to the credit of two trustees at a bank and, although it had notice that the fund was a trust fund, the bank transferred it to the account of the tenant for life at his sole direction and thereby obtained payment of a debt due from him, the trustees were held entitled to sue the bank to have the fund replaced<sup>3</sup>.

1 A deposit in a bank account was not an authorised investment under the Trustee Act 1961 (now substantially repealed by Trustee Act 2000): see PARA 1012 et seq post. Trustees were permitted to pay trust money into a bank to a deposit or other account pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment was being sought and all interest, if any, payable in respect of the deposit was to be treated as income: Trustee Act 1925 s 11(1) (repealed). Six months was the maximum period for which it could reasonably be left uninvested: *Cann v Cann* (1884) 51 LT 770 at 771 per Kay J. It would appear that payment of trust money into a bank, at least in relation to a deposit account, is now authorised by the general power of investment contained in the Trustee Act 2000 s 3: see *Trustees' Powers and Duties* (Law Com no 260) (1999) PARA 2.27 (stating that the investment provisions of the Trustee Act 1925 Pt I (ss 1-11) (repealed) are superseded by the Trustee Act 2000); and see further PARA 1012 et seq post.

2 *Re Gross, ex p Kingston* (1871) 6 Ch App 632; *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406. As to the duty of a bank in relation to trust accounts see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 824, 825, 841-843. Where the settlement allows a bank trustee to deposit trust funds with itself as banker, and the bank becomes insolvent, the trust ranks *pari passu* with unsecured creditors: *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, PC.

3 *Bridgman v Gill* (1857) 24 Beav 302. See also *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(1) DUTIES OF TRUSTEES/(vi) Investment/970. Mismanagement by the trustees of the trust investments.

### **970. Mismanagement by the trustees of the trust investments.**

Failure to maintain the capital value of the trust fund is not per se an actionable breach of trust<sup>1</sup>. In order to succeed in their claim where there are symptoms of incompetence or idleness on the part of the trustees, the beneficiaries must show that through one or other or both of these causes the trustees made decisions which they should not have made or failed to make decisions which they should have made, and further that loss to the trust estate resulted therefrom<sup>2</sup>. Further, irrespective of breaches of trust during the decision-making process, the beneficiaries of a trust do not have a claim against trustees who have made an investment decision unless they can establish that the decision was one that no reasonable trustee could have made<sup>3</sup>. If a decision by trustees is objectively right, they will not be liable even if it was in fact made on wholly wrong grounds<sup>4</sup>.

1 *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA; *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690.

2 *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA (it was held or assumed by all the members of the court that the trustees had at all relevant times been under a misunderstanding as to the scope of the investment clause in the will, in relation to which it was said to be inexcusable not to have taken legal advice; and further they had failed to carry out regular reviews of the trust investments). As to breach of trust generally see PARA 1084 et seq post.

3 *Wight v Olswang* [2000] WTLR 783, [2000] 18 LS Gaz R 37.

4 *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA.

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## **(2) POWERS OF TRUSTEES**

### **(i) In general**

#### **A. NATURE OF POWERS**

##### **971. Discretionary nature of powers.**

A trustee's powers may be administrative or dispositive<sup>1</sup>. Administrative powers are those relating to prudent management in the discharge of the trustee's duty to maintain the trust estate<sup>2</sup>. Dispositive powers are those intended to have an actual effect on the benefits which the beneficiaries become entitled to receive<sup>3</sup>.

Powers may be purely discretionary or may be of the nature of a trust or obligation, as in the case of discretionary trusts<sup>4</sup>.

A trustee must consider whether or not to exercise a purely discretionary power but will not be compelled to exercise it<sup>5</sup>, even though its non-exercise will benefit one beneficiary at the expense of another<sup>6</sup>. Where a power is of the nature of a trust or obligation its exercise is compellable but the court will not override the trustees discretion as to the time and manner of its exercise<sup>7</sup>.

Where there is a deadlock between trustees as to the exercise of a purely discretionary power, the court, even though the discretion has not been surrendered to it, may interfere and in effect give the casting vote<sup>8</sup>.

Discretionary trust powers over income remain exercisable despite the passing of time, although only in favour of such persons as would have been possible beneficiaries if the discretion had been exercised within a reasonable time<sup>9</sup>; but, if purely discretionary powers are not exercised within a reasonable time, the discretion is extinguished and the default beneficiaries are entitled<sup>10</sup>.

1 *Pearson v IRC*[1981] AC 753, [1980] 2 All ER 479, HL (whether beneficiary had an interest in possession for capital transfer tax purposes). The distinction is not always easy to draw but is nonetheless a valid distinction: *Pearson v IRC* supra at 775 and 486 per Viscount Dilhorne.

2 *Andrew John Miller Robertson's Trustees v Lord Advocate for the IRC*[1987] SCLR 433 at 445 per Lord Kinraig drawing on the speech of Lord Keith of Kinkel in *Pearson v IRC*[1981] AC 753, [1980] 2 All ER 479, HL.

3 *Pearson v IRC*[1981] AC 753 at 785, [1980] 2 All ER 479 at 494, HL, per Lord Keith of Kinkel.

4 As to the distinction between 'powers' and 'trust powers' see *McPhail v Doulton*[1971] AC 424 at 448, [1970] 2 All ER 228 at 239-240, HL, per Lord Wilberforce. See also PARA 611 ante.

5 *Marquis Camden v Murray*(1880) 16 ChD 161; *Tempest v Lord Camoys*(1882) 21 ChD 571, CA; *Re Blake, Jones v Blake*(1885) 29 ChD 913, CA; *Re Courtier, Coles v Courtier, Courtier v Coles*(1886) 34 ChD 136, CA.

6 *Re Courtier, Coles v Courtier, Courtier v Coles*(1886) 34 ChD 136, CA; *Train v Clapperton*[1908] AC 342, HL; *Re Charteris, Charteris v Biddulph*[1917] 2 Ch 379 at 397, 399, CA.

7 See *Re Charteris, Charteris v Biddulph*[1917] 2 Ch 379, CA. See also PARAS 973, 975 ante.

8     *Klug v Klug*[1918] 2 Ch 67 (where one trustee was not prepared to consider exercising her discretion in favour of her daughter who had married without her consent).

9     *Re Locker's Settlement Trusts, Meachem v Sachs*[1978] 1 All ER 216, [1977] 1 WLR 1323.

10    *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick*[1966] 1 All ER 740, [1966] 1 WLR 499; *Re Gulbenkian's Settlement Trusts (No 2), Stephens v Maun*[1970] Ch 408, [1969] 2 All ER 1173.

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## 972. Inherent powers.

Subject to any special provisions in the instrument creating the trust, a trustee may do acts which are reasonable and proper for realising the trust property<sup>1</sup> or for protecting it<sup>2</sup>, and may make payments which are necessary for the due execution of the trust<sup>3</sup>, and which would be sanctioned by a court of equity if its sanction were applied for<sup>4</sup>. As a rule, however, in any case of doubt, the trustee should obtain this sanction before so acting<sup>5</sup>.

1 *Waldo v Waldo* (1835) 7 Sim 261 at 262; *Ward v Ward* (1843) 2 HL Cas 777n at 784n-786n. See also PARA 959 ante. Where an immediate realisation would have caused serious loss to the trust estate, a trustee may arrange for payment of a debt due to it from one of the beneficiaries by instalments: *Ward v Ward* supra at 786n-787n. A trustee under an occupational pension scheme may enter into a compromise agreement rather than pursue a statutory debt owed under the scheme to the point of forcing an employer into liquidation: *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] EWHC 651 (Ch), [2002] ICR 1427.

2 *Bright v North* (1847) 2 Ph 216; *Stott v Milne* (1884) 25 ChD 710, CA. See also PARA 959 ante. A trustee may, at the cost of the trust estate, oppose a Bill in Parliament which would be prejudicial to it: *Bright v North* supra. Where the person liable to pay the premiums in respect of a policy of assurance belonging to a trust was unable to pay them, the trustee was held entitled to surrender the policy in exchange for a fully paid up policy of a less amount: *Re Steen's Trusts, Steen v Peebles* (1890) 25 LR 544.

3 *Forshaw v Higginson* (1857) 8 De GM & G 827 at 834 per Turner LJ. As to an acknowledgment by a trustee or his agent of a debt due from the trust estate see LIMITATION PERIODS vol 68 (2008) PARA 1185.

4 *Inwood v Twyne* (1762) 2 Eden 148 at 153 per Lord Henley LC; *Lee v Brown* (1798) 4 Ves 362 at 369 per Arden MR; *Seagram v Knight* (1867) 2 Ch App 628 at 630 per Lord Chelmsford LC. As to a trustee's statutory powers to compromise, settle or abandon claims see the Trustee Act 1925 s 15 (prospectively amended); and PARA 1052 post.

5 *Forshaw v Higginson* (1857) 8 De GM & G 827 at 834. See also PARAS 948 ante, 1074 et seq post.

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### **973. Express and statutory powers.**

Powers may be conferred upon a trustee expressly by the instrument creating the trust or by statute. A trustee may exercise all such lawful powers<sup>1</sup>, and may use such discretion with respect to the time and manner and extent of exercising them as is permitted by the terms of the instrument conferring them<sup>2</sup>.

1 *Costabadie v Costabadie* (1847) 6 Hare 410; *Austin v Austin*, *Austin v Boyce* (1876) 4 ChD 233; *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Tabor v Brooks* (1878) 10 ChD 273; *Re Blake*, *Jones v Blake* (1885) 29 ChD 913, CA; *Earl of Gainsborough v Watcombe Terra Cotta Clay Co Ltd*, *Dunning v Earl of Gainsborough* (1885) 54 LJ Ch 991. As to powers of maintenance and advancement see PARAS 1049-1050 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 58 et seq. As to the general powers of trustees of land see PARA 1035 post. For the meaning of 'trustees of land' see PARA 724 note 7 ante.

2 *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Tabor v Brooks* (1878) 10 ChD 273; *Re Weaver* (1882) 21 ChD 615 at 618, CA; *Re Blake*, *Jones v Blake* (1885) 29 ChD 913, CA; *Re Burrage*, *Burningham v Burrage* (1890) 62 LT 752; *Re Atkins*, *Newman v Sinclair* (1899) 81 LT 421; *Re Powles*, *Little v Powles* [1954] 1 All ER 516, [1954] 1 WLR 336; *Re Steed's Will Trusts* [1960] Ch 407, [1960] 1 All ER 487, CA. Where there are two separate discretionary trusts for the benefit of the same beneficiary, each trust requires a separate and independent exercise of the discretion, and there is no right of contribution or common obligation between the two trusts: *Smith v Cock* [1911] AC 317, PC. As to the exercise of powers generally see POWERS vol 36(2) (Reissue) PARA 260 et seq. As to powers in the nature of trusts and discretionary trusts see PARA 611 ante; and POWERS vol 36(2) (Reissue) PARA 208 et seq. As to powers being annexed to the office of trustee see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 471.

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## **B. EXERCISE OF POWERS**

### **974. Proper exercise of powers.**

A trustee must exercise his powers reasonably and in good faith<sup>1</sup> and for the purposes for which they were created<sup>2</sup>. Accordingly, a trustee may not use the powers which the possession of the legal estate in the trust property confers on him in law except in a proper way for the legitimate purposes of the trust<sup>3</sup>.

In exercising his power a trustee must give proper consideration to the matters which are relevant and exclude from consideration matters which are irrelevant<sup>4</sup>. He must, therefore, inform himself before making a decision of matters which are relevant to the decision<sup>5</sup>. These matters may not be limited to simple matters of fact but will on occasion include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, scientists or whomsoever. It is, however, for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so<sup>6</sup>) delegate the exercise of their discretions, even to experts<sup>7</sup>. Similarly, although a trustee is entitled to take account of any wishes expressed by the settlor<sup>8</sup>, the trustee must reach his own independent conclusion having taken account of such wishes<sup>9</sup>. In reaching decisions as to the exercise of his fiduciary powers, a trustee has to try to weigh up competing factors, which may be incommensurable in character. In that sense he has to be fair. But he is not a court and is not under any general duty to give a hearing to both sides; indeed in many situations 'both sides' is a meaningless expression<sup>10</sup>.

It seems that, if the same result as can be achieved legitimately by a circuitous course and the exercise of a power can be achieved directly, the court will not insist on the circuitry of action<sup>11</sup>. The court may set aside the purported exercise of a power if the trustees did not apply their minds to the exercise of the discretion given to them<sup>12</sup>.

Wherever trustees have a discretionary power and are in doubt how in the relevant circumstances they ought to exercise it, they can go to the court and obtain directions as to what is the proper thing for them to do<sup>13</sup>. The court will not, however, accept from trustees the surrender for the future of a discretion which involves considering from time to time changing circumstances. The court will not relieve the trustees of their obligation to apply their minds to the problem and, if they cannot themselves arrive at a satisfactory answer, to inform the court of the relevant circumstances and seek the court's direction from time to time<sup>14</sup>.

Where a trustee is about to exercise a power improperly, he may be restrained by injunction<sup>15</sup>.

1 The court will not interfere with the exercise in good faith by a trustee of a discretionary power: *Gisborne v Gisborne*(1877) 2 App Cas 300, HL; *Tempest v Lord Camoys*(1882) 21 ChD 571, CA; *Re Steed's Will Trusts*[1960] Ch 407, [1960] 1 All ER 487, CA. See also PARA 967 ante. This is so even if the way in which the trustees propose to exercise their discretion is against the wishes of all the living beneficiaries if there are in law other possible beneficiaries not yet born: see *Re Whichelow, Bradshaw v Orpen*[1953] 2 All ER 1558, [1954] 1 WLR 5 (where the court refused to control the exercise by trustees of their voting powers as shareholders of a company). Cf *Butt v Kelson*[1952] Ch 197, sub nom *Re Butt, Butt v Kelson*[1952] 1 All ER 167, CA; and see *Re Brockbank, Ward v Bates*[1948] Ch 206, [1948] 1 All ER 287; *Wilson v Law Debenture Trust Corp plc*[1995] 2 All ER 337. In *Breadner v Granville-Grossman*[2001] Ch 523, [2000] 4 All ER 705, where the trustees intended to exercise their power of appointment, but had failed to do so within the time limit, the court would not intervene. In relation to a trust deed governing a pension fund see *Harris v Shuttleworth* [1994] ICR 991, [1994] IRLR 547, CA; *Wild v Pensions Ombudsman*[1997] 1 FCR 248, [1996] 2 FLR 680.

2 *Ord v Noel* (1820) 5 Madd 438 at 440 per Leach MR; *Molyneux v Fletcher*[1898] 1 QB 648; *Re Schneider, Kirby v Schneider* (1906) 22 TLR 223; *Smith v Cock*[1911] AC 317, PC; *Dundee General Hospitals v Bell's Trustees*1950 SC 406. For examples of the need to have regard to the purpose for which a power was conferred see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co*[1964] Ch 303, [1963] 3 All ER 1, CA (exercise of power of advancement). As to impartiality in the exercise of powers see PARA 975 post.

3 *Balls v Strutt* (1841) 1 Hare 146 at 149 per Wigram V-C; *Re Manisty's Settlement, Manisty v Manisty*[1974] Ch 17, [1973] 2 All ER 1203. In exercising his powers a trustee must do his best for the beneficiaries and may be justified in committing a breach of commercial morality in certain circumstances, eg in the exercise of his power of sale: see *Buttle v Saunders*[1950] 2 All ER 193 (where it was held that, even though the trustees had orally agreed to sell the property to a purchaser, they should have accepted a higher offer from another purchaser). As to a trustee's power of sale see PARA 1041 post.

4 *Edge v Pensions Ombudsman*[1999] 4 All ER 546 at 567, [2000] 3 WLR 79 at 100, CA, per Chadwick LJ.

5 *Re Powles, Little v Powles*[1954] 1 All ER 516, [1954] 1 WLR 336 (exercise of discretionary power to spend capital); *Re Baden's Deed Trust (No 2)*[1973] Ch 9 at 20, 27, [1972] 2 All ER 1304 at 1310, 1316, CA; *Re Hay's Settlement Trusts*[1981] 3 All ER 786 at 792-793, [1982] 1 WLR 202 at 209-210.

6 See PARA 984 et seq post.

7 *Scott v National Trust for Places of Historic Interest or Natural Beauty*[1998] 2 All ER 705, sub nom *Ex p Scott* [1998] 1 WLR 226; *Dundee General Hospitals Board of Management v Walker*[1952] 1 All ER 896, HL; *Re Hastings-Bass*[1975] Ch 25, [1974] 2 All ER 193, CA; *Metttoy Pension Trustees Ltd v Evans*[1991] 2 All ER 513, [1990] 1 WLR 1587; *Stannard v Fisons Pensions Trust*[1992] IRLR 27, CA.

8 *Charman v Charman*[2005] EWCA Civ 1606 at [67], [2006] 1 WLR 1053 at [67], [2006] 2 FLR 422 at [67] per Lloyd LJ. See also *Re Barr's Settlement Trust, Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, Royal Court of Jersey, where it was held that the decision by trustees to make an appointment could be set aside on the *Hastings-Bass* principle because the trustees had misunderstood the settlor's wishes. As to the *Hastings-Bass* principle see PARA 977 post.

9 See *Re the Esteem Settlements, Grupa Torras AW v Al-Sabah* [2003] JRC 092 at [166], [2004] WTRL 1 at [166], sub nom *Re Abacus (CI) Ltd (trustee of the Esteem Settlement), Grupo Torras SA v Al Sabah* (2002) 6 ITEL 368 at [166], Royal Court of Jersey; *Re Rabaioiti's 1989 Settlement* (2000) 2 ITEL 763 at 779-780, Royal Court of Jersey.

10 *Scott v National Trust for Places of Historic Interest or Natural Beauty*[1998] 2 All ER 705, sub nom *Ex p Scott* [1998] 1 WLR 226.

11 As to the basis of the non statutory power of personal representatives to appropriate assets in satisfaction of a pecuniary legacy or share of residue see *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA.

12 *Turner v Turner*[1984] Ch 100, [1983] 2 All ER 745 (where appointments by trustees were set aside as they had executed the documents at the settlor's behest without understanding that they had a discretion whether or not to make the appointments).

13 *Talbot v Talbot*[1968] Ch 1, [1967] 2 All ER 920, CA. See also *Thrells Ltd v Lomas*[1993] 2 All ER 546, [1993] 1 WLR 456 (conflict of interest); *Fuller v Evans*[2000] 1 All ER 636, [2000] Fam Law 542; *Breadner v Granville-Grossman*[2001] Ch 523, [2000] 4 All ER 705.

14 *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick*[1966] 1 All ER 740, [1966] 1 WLR 499.

15 *Re Chertsey Market, ex p Walthew* (1819) 6 Price 261 at 279 per Richards CB; *Reeve v Parkins* (1820) 2 Jac & W 390; *Anon* (1821) 6 Madd 10; *Ludlow Corp'n v Greenhouse* (1827) 1 Bli NS 17 at 57, HL, per Lord Eldon LC; *Milligan v Mitchell* (1833) 1 My & K 446; *A-G v Liverpool Corp'n* (1835) 1 My & Cr 171 at 210; *Balls v Strutt* (1841) 1 Hare 146; *Marshall v Sladden* (1851) 4 De G & Sm 468 at 469 per Knight Bruce V-C; *Dance v Goldingham*(1873) 8 Ch App 902; *Waller v Waller*[1967] 1 All ER 305, [1967] 1 WLR 451. See also CIVIL PROCEDURE vol 11 (2009) PARA 471.



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### **975. Impartial exercise of powers.**

In exercising or refraining from the exercise of any power a trustee must act honestly<sup>1</sup>, and must not benefit one beneficiary at the expense of another<sup>2</sup>, except so far as the exercise of a discretion expressly permitted to him by the instrument creating the trust necessarily involves that result<sup>3</sup>.

If the power is one for the good administration of the trust estate, the trustee must exercise it in the general interest of the estate and of all beneficiaries<sup>4</sup>.

If the trust has only a limited estate or interest in the trust property, the trustee may not exercise the power in such a manner as to prejudice the rights of a remainderman<sup>5</sup>.

1 *Marquis of Camden v Murray* (1880) 16 ChD 161 at 170 per Malins V-C; *Tempest v Lord Camoys* (1882) 21 ChD 571, CA; *Re Blake, Jones v Blake* (1885) 29 ChD 913, CA; *Re Burrage, Burningham v Burrage* (1890) 62 LT 752; *Re Smith, Smith v Thompson* [1896] 1 Ch 71. Cf *Re Evans, Jones v Evans* [1913] 1 Ch 23 at 33.

2 *Wood v Pattenon* (1874) 10 Beav 541 at 543-544. See PARA 951 ante.

3 *Costabadie v Costabadie* (1847) 6 Hare 410; *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Tabor v Brooks* (1878) 10 ChD 273; *Re Lofthouse* (1885) 29 ChD 921, CA; *Re Courtier, Coles v Courtier, Courtier v Coles* (1886) 34 ChD 136, CA; *Re Bryant, Bryant v Hickley* [1894] 1 Ch 324; *Train v Clapperton* [1908] AC 342, HL; *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379, CA. Properly understood, the duty to act impartially is no more than the duty to exercise a discretionary power for the purpose it was given, giving consideration to matters which are relevant and excluding from consideration matters which are irrelevant; a preference will be the result of a proper exercise of a discretionary power: *Edge v Pensions Ombudsman* [2000] Ch 602 at 627, [1999] 4 All ER 546 at 567, CA, per Chadwick LJ.

4 *Re Charteris, Charteris v Biddulph* [1917] 2 Ch 379 at 394, 398-399; followed in *Re Hayes' Will Trusts, Pattinson v Hayes* [1971] 2 All ER 341, [1971] 1 WLR 758. It seems that the legitimate expectation of potential beneficiaries should be taken into account: *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, sub nom *Ex p Scott* [1998] 1 WLR 226.

5 *Jesse v Lloyd* (1883) 48 LT 656 at 659 per Kay J.

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## 976. Invalid exercise of powers.

There are several different categories of case where the exercise by trustees of a discretionary power may be invalid<sup>1</sup>: (1) there may be a formal or procedural defect, such as the failure to use the stipulated form of document (for example, a document under hand instead of a deed), or to obtain a necessary prior consent<sup>2</sup>; (2) the power may have been exercised in a way which it does not authorise (for example, with an unauthorised delegation)<sup>3</sup>, or by the inclusion of beneficiaries who are not objects of the power<sup>4</sup>; (3) the exercise may infringe some rule of the general law, such as the rule against perpetuities<sup>5</sup>; (4) the trustees may have exercised the power for an improper purpose, in cases known as fraud on the power<sup>6</sup>; (5) the trustees may have been unaware that they had any discretion to exercise<sup>7</sup>.

In addition to these categories, of which the first four are clear and well-established, there is now the developing rule or principle in *Hastings-Bass*, where the trustees have failed to have regard to some relevant consideration which they ought to have taken into account<sup>8</sup>.

1 As to intervention by the court in these circumstances see PARA 1067 et seq post.

2 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ; *Re Phillips, Robinson v Burke* (1889) 41 ChD 417; *Re Evered, Molyneux v Evered* [1910] 2 Ch 147.

3 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ; *A-G v Scott* (1789) 1 Ves Sen 413, sub nom *Wilson v Dennison* (1750) Amb 82; *Wilson v Kirshaw* (1750) 7 Bro Parl Cas 296; *Re Boulton's Settlement Trust, Stewart v Boulton* [1928] Ch 703; *Green v Whitehead* [1930] 1 Ch 38, CA; *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202.

4 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ; *Re Gulbenkian's Settlement Trusts, Wishaw v Stephens* [1970] AC 508, [1968] 3 All ER 785.

5 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ.

6 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ (citing *Cloutte v Storey* [1911] 1 Ch 18, [1908-10] All ER Rep 1073; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862). See also Thomas on Powers (1st Edn) p 453 et seq.

7 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ (citing *Turner v Turner* [1984] Ch 100, [1983] 2 All ER 745).

8 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [38], [2005] 3 All ER 693 at [38], [2004] 1 WLR 3811 at [38] per Lloyd LJ. See further PARA 977 post.

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### **977. 'Hastings-Bass' principle.**

The rule in *Hastings-Bass* is a comparatively recent development<sup>1</sup>. Where a trustee acts under a discretion given to him by the terms of the trust, in circumstances in which he is free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to take into account<sup>2</sup>. Where only part of the decision is affected, the court will set aside only the affected part<sup>3</sup>.

The principle may apply where there has been no breach of duty by the trustees or their advisers or agents<sup>4</sup>. Fiscal consequences are amongst the matters which may be relevant for the purposes of the principle<sup>5</sup>. The court has declined to extend the *Hastings-Bass* principle to a contract concluded between a trustee and a third party<sup>6</sup>.

1 The relevant cases contributing to its development were reviewed by Lloyd LJ sitting as a judge of the Chancery Division in *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693, [2004] 1 WLR 381. See *Re Vestey's Settlement*, *Lloyd's Bank Ltd v O'Meara* [1951] Ch 209, [1950] 2 All ER 891, CA; *Re Pilkington's Will Trusts*, *Pilkington v Pilkington* [1964] AC 612, [1962] 3 All ER 622; *Re Abraham's Will Trusts*, *Caplan v Abrahams* [1969] 1 Ch 463, [1967] 2 All ER 1175; *Re Hastings-Bass*, *Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

2 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [119], [2005] 3 All ER 693 at [119], [2004] 1 WLR 3811 at [119] per Lloyd LJ sitting as a judge of the Chancery Division. Only where the beneficiary is entitled to require the trustees to act is it sufficient to vitiate the decision if consideration of the relevant matters might materially have affected it: see *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071, CA; *Stannard v Fisons Pension Trust Ltd* [1990] 1 PLR 179; *Sieff v Fox* supra; *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), (2006) 8 ITELR 917. But as to whether this is a correct approach in the case of pension trusts where the members have 'bought' their benefits see *Re Barr's Settlement Trusts*, *Abacus Trust Company (Isle of Man) v Barr* [2003] EWHC 114 (Ch) at [23], [2003] Ch 409 at [23], [2003] 1 All ER 763 at [23] per Lightman J. See also David Hayton 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' in *The Conveyancer and Property Lawyer* (2005) p 229.

3 *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569. As to whether infringement of the *Hastings-Bass* principle renders the exercise of the power void rather than voidable see *Green v Cobham* [2002] STC 820, [2000] WTLR 1101 (void); *AMP (UK) plc v Barker* [2001] PLR 77 (void); *Abacus Trust Company (Isle of Man) Ltd v NSPCC* (2001) 3 ITELR 846, [2001] STC 1344 (void); *Re Barr's Settlement Trusts*, *Abacus Trust Company (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, [2003] 1 All ER 763 (held to be voidable: see at [28]-[33] per Lightman J); *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] All ER (D) 177 (Jan) (void); *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693, [2005] 1 WLR 3811 (held to be void).

4 *Sieff v Fox* [2005] EWHC 1312 (Ch) at [119], [2005] 3 All ER 693 at [119], [2004] 1 WLR 3811 at [119] per Lloyd LJ. Cf *Re Barr's Settlement Trusts*, *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, [2003] 1 All ER 763.

5 *Abacus Trust Co (Isle of Man) Ltd v NSPCC* (2001) 3 ITELR 846 at 858-859, [2001] STC 1344 at 1353-1354 per Patten J; *Green v Cobham* [2002] STC 820, [2000] WTLR 1101; *Sieff v Fox* [2005] EWHC 1312 (Ch) at [119], [2005] 3 All ER 693 at [119], [2004] 1 WLR 3811 at [119] per Lloyd LJ; *Burrell v Burrell* [2005] EWHC 245 (Ch) at [19], [2005] STC 569 at [19] per Mann J. Her Majesty's Revenue and Customs will consider participating in cases where large amounts of tax are at stake and/or where it can usefully contribute to the elucidation and development of the principle: Inland Revenue *Tax Bulletin*, Issue 83, June 2006.

6     *Donaldson v Smith* (2006) 150 Sol Jo LB 744, [2006] All ER (D) 293 (May). The impact of mistake or misunderstanding by one or both parties on a contract is addressed and regulated by the general law of contract; there is no room for the application of the *Hastings-Bass* principle in this area.

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### **978. Control over the exercise of the trustees' powers.**

Once the trust is completely constituted the settlor has no control over the administration of the trust by the trustees<sup>1</sup>, except in so far as there is some appropriate provision in the trust instrument. Thus the trust instrument may require the trustees to obtain the consent of the settlor to the exercise of specified powers, or they may be required to obtain the consent of a named person or persons<sup>2</sup>. Particularly in the case of overseas settlements with foreign trustees, it is a common practice to appoint 'protectors'<sup>3</sup> for this purpose, who may be given a wide variety of powers. The exact status and powers of the protector depend on the terms of the trust instrument: prima facie his powers are fiduciary<sup>4</sup>. There are limits, however, to the powers which he may be given. He cannot be given power to determine questions of law arising in the construction or administration of the trust<sup>5</sup>, and it is doubtful whether he could be empowered to deprive the beneficiaries of their right to inspect the trust documents<sup>6</sup>.

1 There is widespread use by settlors of letters of wishes which are not legally binding: see PARA 974 ante.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 8(2); and PARA 1035 post.

3 A protector may be called by some other name, such as adviser, appointor or management committee. Tax considerations may explain why the settlor appoints a protector rather than reserving powers to himself.

4 See *IRC v Schroder* [1983] STC 480, 57 TC 94. It seems that the court has the same inherent jurisdiction as in respect of trustees to appoint a person to exercise the protector's powers, or, as a last resort, to exercise those powers itself: see *Steele v Paz Ltd (in liquidation)* (unreported), extracts from which appear in Butterworths Offshore Cases and Materials (1996) vol 1 at p 338 et seq.

5 See *Re Wynn* [1952] Ch 271, sub nom *Re Wynn's Will Trusts* [1952] 1 All ER 341; and PARA 1070 post.

6 See *Re Londonderry's Settlement* [1965] Ch 918, [1964] 3 All ER 855, CA; and PARAS 962 ante, 1057 post.

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### **979. Exercise of discretionary powers after payment into court or where trust administered by court.**

A trustee may not exercise a discretionary power in relation to a trust fund which has been paid into court<sup>1</sup>.

Where a trust is being administered by the court<sup>2</sup>, the trustee may, with the sanction of the court<sup>3</sup>, exercise discretionary powers with respect to it<sup>4</sup>, but he cannot act without that sanction<sup>5</sup>, and in a proper case the court will control the exercise of his discretion<sup>6</sup>.

1 As to the effect of payment into court see PARA 922 ante. See also *Re Nettlefold's Trusts* (1888) 59 LT 315.

2 As to the administration of trusts by the court see PARA 1067 et seq post.

3 *Shewen v Vanderhorst* (1830) 2 Russ & M 75 per Leach MR (affd (1831) 1 Russ & M 347); *Mitchelson v Piper* (1836) 8 Sim 64; *Minors v Battison* (1876) 1 App Cas 428 at 438, HL, per Lord Chelmsford; *Re Gadd, Eastwood v Clark* (1883) 23 ChD 134, CA; *Cecil v Langdon* (1884) 28 ChD 1, CA; *Re Hall, Hall v Hall* (1885) 51 LT 901.

4 *Jones v Powell* (1841) 4 Beav 96; *Gisborne v Gisborne* (1877) 2 App Cas 300, HL; *Warren v Clancy* [1898] 1 IR 127, Ir CA.

5 *Walker v Smalwood* (1768) Amb 676. Therefore, on a purchase of land from trustees, a search must be made for any pending claim: see LAND CHARGES vol 26 (2004 Reissue) PARA 647 et seq. It has been held, however, that where statutory trusts supervened, eg owing to the land being held in undivided shares, those trusts and the powers incidental to them could be exercised without the consent of the court (see *Bernhardt v Galsworthy* [1929] 1 Ch 549), and the same view may well be taken in relation to a trust of land under the Trusts of Land and Appointment of Trustees Act 1996. For the meaning of 'trust of land' see PARA 605 note 5 ante.

6 *Bethell v Abraham* (1873) LR 17 Eq 24; *Walker v Walker* (1820) 5 Madd 424; *Re Viscount Furness, Wilson v Kenmare* [1943] Ch 415, [1944] 1 All ER 66. As to the court's interference in the administration of a trust see further PARA 1067 post; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 705.

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## **980. Disclaimer and release of powers.**

A trustee or other person to whom any power is given, whether coupled with an interest or not<sup>1</sup>, may by deed disclaim the power before expressly or impliedly accepting any trusteeship under which the power arises, and, after the disclaimer, is not capable of exercising or joining in the exercise of the power<sup>2</sup>. On such disclaimer the power may be exercised by the other or others, if any, of the persons to whom the power is given, or the survivor or survivors of those others, unless the contrary is expressed in the instrument creating the power<sup>3</sup>. This power of disclaimer does not, however, enable a trustee to get rid of part of the trusts imposed on him<sup>4</sup>.

A person who has a special power of appointment in his capacity as trustee may release it only if authorised by the trust instrument<sup>5</sup>; but a person who has a special power of appointment in his private capacity may release it whenever he wishes<sup>6</sup>.

1 As to powers coupled with an interest see POWERS vol 36(2) (Reissue) PARA 201 et seq.

2 Law of Property Act 1925 s 156(1). See further POWERS vol 36(2) (Reissue) PARA 375.

3 Ibid s 156(2).

4 See POWERS vol 36(2) (Reissue) PARA 375. As to the effect of disclaimer of office by a trustee see PARA 814 ante.

5 See *Re Courage Group's Pension Schemes, Ryan v Imperial Brewing and Leisure Group Ltd* [1987] 1 All ER 528, [1987] 1 WLR 495. Alternatively the power may be extinguished on an application under the Variation of Trusts Act 1958: see PARA 1062 et seq post.

6 See *Re Wills' Trust Deeds, Wills v Godfrey* [1964] Ch 219, [1963] 1 All ER 390; *Re Evered, Molineux v Evered* [1910] 2 Ch 147, CA; and POWERS vol 36(2) (Reissue) PARAS 375-376.

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### **C. DEVOLUTION AND TRANSMISSION OF POWERS**

#### **981. Devolution of powers.**

Every new trustee appointed either under the statutory power<sup>1</sup> or by a court of competent jurisdiction has the same powers, authorities and discretions as if he had originally been appointed trustee by the instrument, if any, creating the trust<sup>2</sup>, unless a contrary intention is expressed in that instrument<sup>3</sup>. Where new trustees are appointed under an express power in a trust instrument, the principle applicable is that *prima facie* powers given to trustees are incident to their office and pass to the holders of the office for the time being in the absence of a contrary intention expressed in clear language<sup>4</sup>. Apart from statute, on the death of a sole or last surviving trustee the trusts and powers vested in him may only be executed by some person pointed out by the creator of the trust as a proper person for that purpose<sup>5</sup>. Until the appointment of new trustees<sup>6</sup>, the personal representatives of a sole or last surviving or continuing trustee, unless a contrary intention is expressed in the trust instrument, may exercise or perform any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust<sup>7</sup>.

1 As to appointment under statute see PARA 835 et seq ante.

2 See the Trustee Act 1925 ss 36(7), 43; and PARAS 843, 854 ante. As to appointment by the court see PARA 849 et seq ante.

3 See *ibid* s 69(2); and PARA 603 ante.

4 See *Re Smith, Eastick v Smith*[1904] 1 Ch 139 at 144 per Farwell J; *Re Hampton, Public Trustee v Hampton* (1918) 88 LJ Ch 103.

5 *Re Crunden and Meux's Contract*[1909] 1 Ch 690. See also *Cooke v Crawford* (1842) 13 Sim 91 at 96 per Shadwell V-C; *Re Morton and Hallett*(1880) 15 ChD 143, CA; *Re Cunningham and Frayling*[1891] 2 Ch 567.

6 See PARA 818 et seq ante. As the personal representatives are acting in the capacity of trustees, any capital money must be paid to at least two persons or a trust corporation: see the Trustee Act 1925 s 18(3); the Law of Property Act 1925 s 27(2) (as substituted and amended); and PARAS 799, 817, 822 ante.

7 See the Trustee Act 1925 s 18(2); and PARA 817 ante. If the last surviving personal representative fails to appoint new trustees, the trust powers devolve on his executor if executor by representation of the sole or last surviving trustee; otherwise the trust powers may only be exercisable by someone who obtains a grant of letters of administration to the estate of the sole or last surviving trustee: see Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 916.



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## **982. Exercise of power where trustee mentally disordered or lacking capacity.**

Until 1 October 2007<sup>1</sup>, where a power is vested in a person suffering from mental disorder in the character of a trustee, or the consent of the person to the exercise of a power is necessary in that character the judge<sup>2</sup> may authorise the exercise of the power and may make such orders and give such directions in connection with it as he thinks fit<sup>3</sup>.

As from 1 October 2007<sup>4</sup>, where a power is vested in a person in the character of a trustee, or the consent of a person to the exercise of a power is necessary in that character and that person lacks capacity<sup>5</sup> in relation to the matter, the Court of Protection<sup>6</sup> may by making an order make the decision or decisions on that person's behalf<sup>7</sup> and may make such further orders or give such directions as it thinks necessary or expedient for giving effect to, or otherwise in connection with, any order or appointment made by it<sup>8</sup>.

1 The Mental Health Act 1983 Pt VII (ss 93-113) is repealed by the Mental Capacity Act 2005 ss 66(1)(a), (2), 67(2), Sch 7 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

2 For the meaning of 'the judge' for these purposes see the Mental Health Act 1983 s 94(1) (as amended); and MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

3 See *ibid* s 96(1)(k) (prospectively repealed); and PARA 830 *ante*. See note 1 *supra*.

4 The Mental Capacity Act 2005 ss 16, 18 come into force on 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897.

5 *Ie* within the meaning of the Mental Capacity Act 2005 s 2 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 641).

6 As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 750.

7 See the Mental Capacity Act 2005 ss 16(2)(a), 18(1)(j); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 757, 759. See note 4 *supra*.

8 See *ibid* s 16(5); and MENTAL HEALTH vol 30(2) (Reissue) PARA 757. See note 4 *supra*.

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### **983. Survivorship.**

Apart from under statute, a bare power given to two or more trustees in whom no estate is vested cannot be exercised by the survivor or survivors unless an intention to that effect is shown by the instrument creating the trust<sup>1</sup>. A power given to trustees in whom the estate is also vested may, however, be exercised by the survivor, unless a contrary intention is indicated by the creator of the trust<sup>2</sup>.

By statute, any power or trust given to or imposed on two or more trustees jointly may be exercised or performed by the survivor or survivors of them for the time being<sup>3</sup>, unless a contrary intention is expressed in the instrument creating the trust<sup>4</sup>.

1 See POWERS vol 36(2) (Reissue) PARA 262.

2 See POWERS vol 36(2) (Reissue) PARA 262.

3 Trustee Act 1925 s 18(1). See further POWERS vol 36(2) (Reissue) PARA 262. Section 18 takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation: see s 18(3); and PARA 981 ante. For the meaning of 'trust corporation' see PARA 798 ante.

4 See *ibid* s 69(2); and PARA 603 ante.

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## **(ii) Power To Delegate And Employ Agents**

### **A. DELEGATION OF POWERS**

#### **984. Power of individual trustee to delegate discretions for a year.**

So far as a contrary intention is not expressed in the trust instrument<sup>1</sup> and notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons<sup>2</sup>. Such a delegation commences as provided by the instrument creating the power or, if the instrument makes no provision as to the commencement of the delegation, with the date of the execution of the instrument by the donor and continues for a period of 12 months or any shorter period provided by the instrument creating the power<sup>3</sup>. The persons who may be donees of such a power of attorney include a trust corporation<sup>4</sup>.

Before or within seven days after giving a power of attorney the donor must give written notice of it to each person (other than himself), if any, who under any instrument creating the trust has power, whether alone or jointly, to appoint a new trustee and each of the other trustees, if any<sup>5</sup>. The notice must specify the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated<sup>6</sup>. However, failure to comply with this requirement does not, in favour of a person dealing with the donee of the power, invalidate any act done or instrument executed by the donee<sup>7</sup>.

A power of attorney given by a single donor in the specified form<sup>8</sup>, or in a form to the like effect but expressed to be made under these provisions, operates to delegate to the person identified in the form as the single donee of the power the execution and exercise of all the trusts, powers and discretions vested in the donor as trustee (either alone or jointly with any other person or persons) under the single trust so identified<sup>9</sup>.

For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer, but not including the power of delegation conferred by these provisions<sup>10</sup>. The fact that it appears from any power of attorney given under these provisions, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust may not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust<sup>11</sup>.

The donor of the power is liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor<sup>12</sup>.

1 See the Trustee Act 1925 s 69(2); and PARA 603 ante.

2 Ibid s 25(1) (s 25 substituted by the Trustee Delegation Act 1999 s 5(1), (2)). The Trustee Act 1925 s 25 (as substituted) has effect in relation to powers of attorney created after the commencement of the Trustee

Delegation Act 1999 (ie 1 March 2000): s 5(2). The provisions of the Trustee Act 1925 s 25 (as substituted) also apply with modifications to a personal representative, tenant for life and statutory owner: s 25(10) (as so substituted).

Subject to the Trustee Delegation Act 1999 s 1 (see PARA 985 post), a general power of attorney may not be used: see the Powers of Attorney Act 1971 s 10(2) (amended by the Trustee Delegation Act 1999 s 3). See also AGENCY vol 1 (2008) PARA 30.

3 Trustee Act 1925 s 25(2) (as substituted: see note 2 supra). The Enduring Powers of Attorney Act 1985 s 2(8), which prevented a power of attorney under the Trustee Act 1925 s 25 (as originally enacted) from being an enduring power, does not apply to powers of attorney created after 1 March 2000: see the Trustee Delegation Act 1999 s 6 (prospectively repealed by the Mental Capacity Act 2005 s 67(2), Sch 7). As from 1 October 2007 the Enduring Powers of Attorney Act 1985 s 2(8) is repealed by the Mental Capacity Act 2005 ss 66(1)(b), (2), 67(2), Sch 7: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. For transitional provisions and savings the Mental Capacity Act 2005 see s 66(3), (4), Sch 4, Sch 5 Pt 2.

4 Trustee Act 1925 s 25(3) (as substituted: see note 2 supra).

5 Ibid s 25(4) (as substituted: see note 2 supra). The previous requirement of attestation by at least one witness became unnecessary following the enactment of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) (as amended) (see GIFTS vol 52 (2009) PARA 231).

6 Trustee Act 1925 s 25(4) (as substituted: see note 2 supra).

7 Ibid s 25(4) (as substituted: see note 2 supra). Where a power of attorney has been revoked and a person without knowledge of the revocation deals with the donee of the power, the transaction between them is, in favour of that person, as valid as if the power had then been in existence: Powers of Attorney Act 1971 s 5(2). A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked does not by reason of the revocation incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked: see s 5(1). See further AGENCY vol 1 (2008) PARA 193.

8 As to the specified form see the Trustee Act 1925 s 25(6) (as substituted: see note 2 supra).

9 Ibid s 25(5) (as substituted: see note 2 supra).

10 Ibid s 25(8) (as substituted: see note 2 supra).

11 Ibid s 25(9) (as substituted: see note 2 supra).

12 Ibid s 25(7) (as substituted: see note 2 supra).

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### **985. Power of individual trustee to delegate under the Trustee Delegation Act 1999.**

The Trustee Delegation Act 1999 creates a statutory exception to the general rule that a trustee must exercise in person the functions vested in him as a trustee<sup>1</sup>. It provides that a donee of a power of attorney created after 1 March 2000<sup>2</sup> is not prevented from doing an act in relation to land<sup>3</sup>, capital proceeds of a conveyance<sup>4</sup> of land or income from land, by reason only that the act involves the exercise of a trustee function of the donor<sup>5</sup> if, at the time when the act is done, the donor has a beneficial interest in the land, proceeds or income<sup>6</sup>. The person creating the trust or the donor may, however, exclude or restrict this provision in the instrument creating the trust, or the power of attorney, as the case may be<sup>7</sup>.

The donor of the power of attorney is liable for the acts or defaults of the donee in exercising any function by virtue of these provisions in the same manner as if they were the acts or defaults of the donor<sup>8</sup>.

The fact that it appears that, in dealing with any shares or stock, the donee of the power of attorney is exercising a function by virtue of these provisions does not affect with any notice of any trust a person in whose books the shares are, or stock is, registered or inscribed<sup>9</sup>.

It follows from the terms of these provisions that a person dealing with a donee needs to know whether the donor has a beneficial interest in the relevant property. Where the interest of a purchaser<sup>10</sup> depends on the donee of a power of attorney having power to do an act in relation to any property<sup>11</sup>, an appropriate statement<sup>12</sup> is, in favour of the purchaser, conclusive evidence of the donor having a beneficial interest in the property at the time of the doing of the act<sup>13</sup>.

1 As to the general rule that a trustee must exercise in person the functions vested in him as a trustee see PARA 952 ante.

2 Ie the date of commencement of the Trustee Delegation Act 1999. Generally, s 1 applies only to powers of attorney created after that date (see s 1(9)); however, s 1 applies to an enduring power created before the commencement of the Act from the time when (in accordance with s 4) the Enduring Powers of Attorney Act 1985 s 3(3) ceases to apply to it (Trustee Delegation Act 1999 s 4(6) (prospectively repealed by the Mental Capacity Act 2005 s 67(2), Sch 7)). References in the Trustee Delegation Act 1999 to the creation of a power of attorney are to the execution by the donor of the instrument creating it: s 11(2). The Enduring Powers of Attorney Act 1985 s 3(3) does not apply to enduring powers created after the commencement of the Trustee Delegation Act 1999 (ie 1 March 2000) (see s 4(1) (prospectively repealed by the Mental Capacity Act 2005 Sch 7)), and is repealed except in relation to enduring powers created before that date (see the Trustee Delegation Act 1999 s 12, Schedule). As to when the Enduring Powers of Attorney Act 1985 s 3(3) ceases to apply to enduring powers created before that date see the Trustee Delegation Act 1999 s 4(2)-(5) (prospectively repealed by the Mental Capacity Act 2005 Sch 7). The Enduring Powers of Attorney Act 1985 s 3(3) is repealed by the Mental Capacity Act 2005 ss 66(1)(b), (2), 67(2), Sch 7 as from 1 October 2007: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. For transitional provisions and savings see the Mental Capacity Act 2005 s 66(3), (4), Sch 4, Sch 5 Pt 2. See further AGENCY vol 1 (2008) PARA 194 et seq.

3 Where the donee of a power of attorney is authorised by the power to do an act of any description in relation to any land, his authority to do an act of that description at any time includes authority to do it with respect to any estate or interest in the land which is held at that time by the donor (whether alone or jointly with any other person or persons): Trustee Delegation Act 1999 s 10(1). This provision applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney, and has effect subject

to the terms of that instrument: s 10(2). For the meaning of 'land' see PARA 605 note 5 ante; definition applied by s 11(1).

4 For these purposes, 'conveyance' has the same meaning as in the Law of Property Act 1925 (see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14): Trustee Delegation Act 1999 s 1(2)(a).

5 References to a trustee function of the donor are to a function which the donor has as trustee (either alone or jointly with any other person or persons): *ibid* s 1(2)(b). The donee of a power of attorney is not to be regarded as exercising a trustee function by virtue of s 1(1) if he is acting under a trustee delegation power: s 1(8). For this purpose, a trustee delegation power is a power of attorney given under a statutory provision or a provision of the instrument (if any) creating the trust, under which the donor of the power is expressly authorised to delegate the exercise of all or any of his trustee functions by power of attorney: s 1(8).

6 *Ibid* s 1(1). These provisions are of particular benefit to co-owners of land who are essentially trustees for themselves, enabling them to delegate without having to comply with the restrictions which apply where trustees hold land only for third parties (see PARA 984 ante). In the few remaining cases where (by way of exception to the Trusts of Land and Appointment of Trustees Act 1996 s 3(1) (see PARA 967 ante) the doctrine of conversion continues to operate, any person who, by reason of the continuing operation of that doctrine, has a beneficial interest in the proceeds of sale of land is treated for the purposes of the Trustee Delegation Act 1999 ss 1, 2 as having a beneficial interest in the land: s 1(7).

7 *Ibid* s 1(1) applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney, and has effect subject to the terms of that instrument: s 1(3). The provisions of s 1(1), (4) (see the text and note 8 *infra*) apply only if and so far as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of such an instrument: s 1(5).

8 *Ibid* s 1(4)(a). The donor is not liable, however, by reason only that a function is exercised by the donee by virtue of these provisions: s 1(4)(b).

9 *Ibid* s 1(6). Cf the Trustee Act 1925 s 25(9) (as substituted); and PARA 984 ante.

10 For these purposes, 'purchaser' has the same meaning as in the Law of Property Act 1925 Pt I (ss 1-39) (as amended) (see SALE OF LAND vol 42 (Reissue) PARA 55): Trustee Delegation Act 1999 s 2(1).

11 *Ibid* s 2(1).

12 'An appropriate statement' means a signed statement made by the donee when doing the act in question, or at any other time within the period of three months beginning with the day on which the act is done, that the donor has a beneficial interest in the property at the time of the donee doing the act: *ibid* s 2(3).

13 *Ibid* s 2(2). If an appropriate statement is false, the donee is liable in the same way as he would be if the statement were contained in a statutory declaration: s 2(4). As to statutory declarations see CIVIL PROCEDURE vol 11 (2009) PARA 1024; and see also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2005 Reissue) PARA 717.

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## **986. Application of the 'two trustee rules' to an attorney acting for a trustee.**

The Trustee Delegation Act 1999 contains provisions intended to strengthen and clarify the operation of the 'two trustee rules'<sup>1</sup> in relation to an attorney acting for a trustee. A requirement imposed by an enactment: (1) that money be paid to, or dealt with as directed by, at least two trustees or that a valid receipt for capital money be given otherwise than by a sole trustee<sup>2</sup>; or (2) that, in order for an interest or power to be overreached, a conveyance or deed be executed by at least two trustees<sup>3</sup>, is not satisfied by money being paid to or dealt with as directed by, or a receipt for money being given by, a relevant attorney<sup>4</sup> or by a conveyance or deed being executed by such an attorney<sup>5</sup>.

1 See PARA 822 ante.

2 Trustee Delegation Act 1999 s 7(1)(a).

3 Ibid s 7(1)(b).

4 For these purposes, 'relevant attorney' means a person (other than a trust corporation within the meaning of the Trustee Act 1925: see PARA 798 ante) who is acting either: (1) both as a trustee and as attorney for one or more other trustees; or (2) as attorney for two or more trustees, and who is not acting together with any other person or persons: Trustee Delegation Act 1999 s 7(2).

5 Ibid s 7(1). Section 7 applies whether a relevant attorney is acting under a power created before or after the commencement of the Trustee Delegation Act 1999 (ie 1 March 2000); but, in the case of such an attorney acting under an enduring power created before that date, s 7 is without prejudice to any continuing application of the Enduring Powers of Attorney Act 1985 s 3(3) (repealed with savings) after that date in accordance with the Trustee Delegation Act 1999 s 4 (see PARA 985 ante): s 7(3). As from 1 October 2007 s 7(3) is amended by the Mental Capacity Act 2005 s 67(2), Sch 7 so as to remove the reference to the Trustee Delegation Act 1999 s 4, and the Enduring Powers of Attorney Act 1985 s 3(3) is repealed by the Mental Capacity Act 2005 ss 66(1)(b), (2), 67(2), Sch 7: see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. For transitional provisions and savings see the Mental Capacity Act 2005 s 66(3), (4), Sch 4, Sch 5 Pt 2.

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### **987. Collective delegation by trustees of land.**

Trustees of land<sup>1</sup> may, by power of attorney, delegate, for a specified period or indefinitely, to any beneficiary<sup>2</sup> or beneficiaries of full age and beneficially entitled to an interest in possession of land subject to the trust any of their functions as trustees which relate to the land<sup>3</sup>. Such a power of attorney cannot, however, be an enduring power of attorney within the meaning of the Enduring Powers of Attorney Act 1985 (or, as from 1 October 2007, a lasting power of attorney within the meaning of the Mental Capacity Act 2005)<sup>4</sup>.

Where trustees purport to delegate to a person by a power of attorney under these provisions and another person in good faith deals with him in relation to the land, he is presumed in favour of that other person to have been a person to whom the functions could be delegated unless that other person has knowledge at the time of the transaction that he was not such a person<sup>5</sup>.

A power of attorney under these provisions must be given by all the trustees jointly, and (unless expressed to be irrevocable and to be given by way of security) may be revoked by any one or more of them; and it is revoked by the appointment as a trustee of a person other than those by whom it is given<sup>6</sup>.

Where a beneficiary to whom functions have been delegated under these provisions ceases to be a person beneficially entitled to an interest in possession in land subject to the trust, then: (1) if the functions are delegated to him alone, the power is revoked<sup>7</sup>; (2) if the functions are delegated to him and to other beneficiaries to be exercised by them jointly (but not separately), the power is revoked if each of the other beneficiaries ceases to be so entitled (but otherwise functions exercisable in accordance with the power are so exercisable by the remaining beneficiary or beneficiaries)<sup>8</sup>; and (3) if the functions are delegated to him and to other beneficiaries to be exercised by them separately (or either separately or jointly), the power is revoked in so far as it relates to him<sup>9</sup>.

Beneficiaries to whom functions have been delegated are, in relation to the exercise of the functions, in the same position as trustees, with the same duties and liabilities; but they are not to be regarded as trustees for any other purpose<sup>10</sup>.

The statutory duty of care<sup>11</sup> applies to trustees of land in deciding whether to delegate any of their functions<sup>12</sup>. A trustee of land is not liable for any act or default of the beneficiary, or beneficiaries, unless the trustee fails to comply with the duty of care in deciding to delegate any of the trustees' functions<sup>13</sup> or in carrying out their subsidiary duties<sup>14</sup>.

1 For the meaning of 'trustees of land' see PARA 724 note 7 ante.

2 For the meaning of 'beneficiary' see PARA 739 note 1 ante.

3 Trusts of Land and Appointment of Trustees Act 1996 s 9(1), (5). Neither s 9 nor the repeal of the Law of Property Act 1925 s 29 (which is superseded by the Trusts of Land and Appointment of Trustees Act 1996 s 9) affects the operation after the commencement of the Trusts of Land and Appointment of Trustees Act 1996 of any delegation effected before that commencement: s 9(9).

4 Ibid s 9(6). As from 1 October 2007 s 9 is amended by the Mental Capacity Act 2005 s 67(1), Sch 6 para 42(1), (2): see the Mental Capacity Act 2005 (Commencement No 2) Order 2007, SI 2006/1897. As to enduring powers of attorney and lasting powers of attorney see AGENCY vol 1 (2008) PARA 194 et seq.



5 Trusts of Land and Appointment of Trustees Act 1996 s 9(2). It is conclusively presumed in favour of any purchaser whose interest depends on the validity of that transaction that that other person dealt in good faith and did not have such knowledge if that other person makes a statutory declaration to that effect before or within three months after the completion of the purchase: s 9(2). As to statutory declarations see CIVIL PROCEDURE vol 11 (2009) PARA 1024; and see also CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2005 Reissue) PARA 717.

6 Ibid s 9(3). A power is not, however, revoked by any of those persons dying or otherwise ceasing to be a trustee: s 9(3).

7 Ibid s 9(4)(a).

8 Ibid s 9(4)(b).

9 Ibid s 9(4)(c).

10 Ibid s 9(7). In particular, they are not to be regarded as trustees for the purposes of any enactment permitting the delegation of functions by trustees or imposing requirements relating to the payment of capital money: s 9(7).

11 Ie under the Trustee Act 2000 s 1; see PARA 949 ante.

12 Trusts of Land and Appointment of Trustees Act 1996 s 9A(1) (added by the Trustee Act 2000 s 40(1), Sch 2 para 47). While the delegation continues the trustees must keep the delegation under review and consider whether there is a need to exercise any power of intervention they may have: Trusts of Land and Appointment of Trustees Act 1996 s 9A(3) (as so added). Delegations effected before 1 February 2001 are not affected by s 9A (as added) nor by the repeal of s 9(8) (which provided that, where any function had been delegated to a beneficiary or beneficiaries under these provisions, the trustees were jointly and severally liable for any act or default of the beneficiary, or any of the beneficiaries, in the exercise of the function if, and only if, the trustees did not exercise reasonable care in deciding to delegate the function to the beneficiary or beneficiaries): s 9(7).

13 Ibid s 9A(6) (as added: see note 12 supra).

14 Ie under ibid s 9A(3) (as added: see note 12 supra).

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## ***B. POWER TO EMPLOY AGENTS UNDER THE TRUSTEE ACT 2000***

### **988. In general.**

Part IV of the Trustee Act 2000<sup>1</sup> confers on trustees<sup>2</sup> powers of delegation enabling them to employ agents<sup>3</sup> and to appoint nominees and custodians<sup>4</sup>, whether the trust was created before or after the commencement of that Act<sup>5</sup>. These powers are in addition to powers otherwise conferred on trustees<sup>6</sup>, but are subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation<sup>7</sup>. These provisions replaced the more limited provisions in the Trustee Act 1925<sup>8</sup>.

1    Ie the Trustee Act 2000 Pt IV (ss 11-27).

2    The provisions of *ibid* Pt IV apply in relation to a trust having a sole trustee as they apply in relation to other trusts; and references in Pt IV to trustees (except in ss 12(1), (3), 19(5): see PARAS 989, 992 post) are to be read accordingly: s 25(1). Part IV does not apply to trustees of authorised unit trusts (s 37(1)) or to trustees managing a fund under a common investment scheme made, or having effect as if made, under the Charities Act 1993 s 24 (see CHARITIES vol 8 (2010) PARA 419) (other than such a fund the trusts of which provide that property is not to be transferred to the fund except by or on behalf of a charity the trustees of which are the trustees appointed to manage the fund) or to trustees managing a fund under a common deposit scheme made, or having effect as if made, under s 25 (see CHARITIES vol 8 (2010) PARA 420): Trustee Act 2000 s 38. 'Authorised unit trust' means a unit trust scheme in the case of which an order under the Financial Services and Markets Act 2000 s 237(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 603) is in force: Trustee Act 2000 s 37(2). Part IV applies to trustees of a pension scheme, subject to certain restrictions: see s 36(4)-(8). For the meaning of 'pension scheme' see PARA 949 note 1 ante.

3    See PARA 989 et seq post.

4    See PARA 991 et seq post. For the meaning of 'custodian' see PARA 991 note 4 post.

5    Trustee Act 2000 s 27.

6    Ibid s 26(a).

7    Ibid s 26(b).

8    See PARAS 998-1000 ante.

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### **989. Power to employ agents collectively.**

The Trustee Act 2000 provides that the trustees<sup>1</sup> of a trust may authorise any person to exercise any or all of their delegable functions as their agent<sup>2</sup>. A distinction is made between charitable and non-charitable trusts. In the case of non-charitable trusts, the trustees' delegable functions consist of any function other than:

- 190 (1) any function relating to whether or in what way any assets of the trust should be distributed<sup>3</sup>;
- 191 (2) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital<sup>4</sup>;
- 192 (3) any power to appoint a person to be a trustee of the trust<sup>5</sup>; or
- 193 (4) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian<sup>6</sup>.

In the case of a charitable trust, the trustees' delegable functions are:

- 194 (a) any function consisting of carrying out a decision that the trustees have taken<sup>7</sup>;
- 195 (b) any function relating to the investment of assets subject to the trust<sup>8</sup>;
- 196 (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose<sup>9</sup>;
- 197 (d) any other function prescribed by an order made by the Secretary of State<sup>10</sup>.

The persons whom the trustees may authorise to exercise functions as their agent include one or more of their number<sup>11</sup>, and a person who is also appointed<sup>12</sup> to act as their nominee or custodian<sup>13</sup>. They cannot, however, authorise a beneficiary to exercise any function as their agent, even if the beneficiary is also a trustee<sup>14</sup>. The trustees may not authorise two or more persons to exercise the same function unless they are to exercise the function jointly<sup>15</sup>.

The statutory duty of care is limited to trustees<sup>16</sup>; it does not apply to an agent in the performance of his agency, although he will owe a separate duty of care to the trust under the general law of agency<sup>17</sup>. In particular, a person who is authorised under these provisions to exercise a function is, whatever the terms of the agency, subject to any specific duties or restrictions attached to the function<sup>18</sup>. A person authorised<sup>19</sup> to exercise a power which is subject to a requirement to obtain advice is not subject to that requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice<sup>20</sup>.

In relation to a trust to which the duty to consult beneficiaries and to give effect to their wishes applies<sup>21</sup>, the trustees may not authorise a person to exercise any of their functions on terms that prevent them from complying with that duty<sup>22</sup>. The duty is non-delegable, and a person who is authorised<sup>23</sup> to exercise any function relating to land subject to the trust is not subject to that duty<sup>24</sup>.

1 See PARA 988 note 2 ante.

2 Trustee Act 2000 s 11(1). The power conferred by s 11 is in addition to powers otherwise conferred on trustees, but is subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation: see s 26; and PARA 988 ante. The statutory duty of care applies to a trustee when entering into arrangements under s 11 to exercise functions as an agent: see ss 1, 2, Sch 1 para 3(1)(a), (d); and PARA 950 ante.

3 Ibid s 11(2)(a). 'Asset' includes any right or interest: s 39(1).

4 Ibid s 11(2)(b).

5 Ibid s 11(2)(c).

6 Ibid s 11(2)(d). For the meaning of 'custodian' see PARA 991 note 4 post.

7 Ibid s 11(3)(a).

8 Ibid s 11(3)(b). This includes, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land: see s 11(3)(b).

9 Ibid s 11(3)(c). For these purposes, a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in the United Kingdom or elsewhere, the profits are applied solely to the purposes of the trust and either the trade is exercised in the course of the actual carrying out of a primary purpose of the trust or the work in connection with the trade is mainly carried out by beneficiaries of the trust: s 11(4). For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

10 Ibid s 11(3)(d). The power to make an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 11(5). As to the Secretary of State see PARA 794 note 36 ante.

11 Ibid s 12(1). This provision does not apply to sole trustees: see PARA 988 note 2 ante.

12 Ie whether under ibid s 16 (see PARA 991 post), s 17 (see PARA 991 post) or s 18 (see PARA 991 post) or any other power.

13 Ibid s 12(4).

14 Ibid s 12(3). This provision does not apply to sole trustees: see PARA 988 note 2 ante. Cf the power of delegation under the Trusts of Land and Appointment of Trustees Act 1996 s 9 (as amended); and PARA 987 ante.

15 Trustee Act 2000 s 12(2).

16 See ibid ss 1, 2, Sch 1; and PARA 949 ante.

17 See AGENCY.

18 Trustee Act 2000 s 13(1). For example, a person who is authorised under s 11 to exercise the general power of investment is subject to the duties under s 4 (standard investment criteria: see PARA 1013 post) in relation to that power: see s 13(1). For the meaning of 'the general power of investment' see PARA 1012 post.

19 Ie under ibid s 11.

20 Ibid s 13(2).

21 Ibid s 13(3). The duty referred to is that under the Trusts of Land and Appointment of Trustees Act 1996 s 11(1): see PARA 1036 post.

22 Trustee Act 2000 s 13(4).

23 Ie under ibid s 11: see the text and notes 1-10 supra.

24 Ibid s 13(5).

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## **990. Terms of agency.**

Under the Trustee Act 2000, trustees<sup>1</sup> may generally authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine<sup>2</sup>. The trustees may not authorise a person to exercise functions as their agent on the following terms unless it is reasonably necessary for them to do so<sup>3</sup>:

- 198 (1) a term permitting the agent to appoint a substitute<sup>4</sup>;
- 199 (2) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary<sup>5</sup>;
- 200 (3) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest<sup>6</sup>.

Special restrictions apply where trustees delegate any of their asset management functions<sup>7</sup>. The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in writing or evidenced in writing<sup>8</sup>. Further the trustees must first prepare a statement that gives guidance as to how the functions should be exercised ('a policy statement')<sup>9</sup>, which must be in or evidenced in writing<sup>10</sup>. The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust<sup>11</sup>. The agreement under which the agent is to act must include a term to the effect that the agent will secure compliance with the policy statement or, if the policy statement is revised or replaced<sup>12</sup>, the revised or replacement policy statement<sup>13</sup>.

1 See PARA 988 note 2 ante.

2 Trustee Act 2000 s 14(1). This provision is subject to s 15(2) (see the text and notes 9-13 infra) and to ss 29-32 (see PARAS 902-903, 932 ante).

3 Ibid s 14(2).

4 Ibid s 14(3)(a).

5 Ibid s 14(3)(b).

6 Ibid s 14(3)(c).

7 The asset management functions of trustees are their functions relating to: (1) the investment of assets subject to the trust; (2) the acquisition of property which is to be subject to the trust; and (3) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property: *ibid* ss 15(5), 39(2). For the meaning of 'asset' see PARA 989 note 3 ante.

8 Ibid s 15(1).

9 Ibid s 15(2)(a). The statutory duty of care applies to trustees in preparing the policy statement: see ss 1, 2, Sch 1 para 3(2)(c); and PARA 950 ante.

10 Ibid s 15(4).

11 Ibid s 15(3).

12     le under ibid s 22: see PARA 995 post.

13     Ibid s 15(2)(b).

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### **991. Appointment of nominees and custodians.**

The Trustee Act 2000 provides that the trustees<sup>1</sup> of a trust may appoint a person to act as their nominee in relation to such of the assets of the trust as they determine (other than settled land<sup>2</sup>), and may take such steps as are necessary to secure that those assets are vested in a person so appointed<sup>3</sup>. Likewise, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine<sup>4</sup>. In either case, the appointment must be in writing or evidenced in writing<sup>5</sup>. These provisions do not apply to any trust having a custodian trustee<sup>6</sup> or in relation to any assets vested in the official custodian for charities<sup>7</sup>.

If trustees<sup>8</sup> retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities<sup>9</sup>, unless the trust instrument or any enactment or provision of subordinate legislation contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian<sup>10</sup>. The appointment must be in writing or evidenced in writing<sup>11</sup>. These provisions do not apply to any trust having a custodian trustee or in relation to any securities vested in the official custodian for charities<sup>12</sup>.

1 See PARA 988 note 2 ante.

2 'Settled land' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 680): Trustee Act 2000 s 39(1).

3 Ibid s 16(1). The power conferred by s 16 is in addition to powers otherwise conferred on trustees, but is subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation: see s 26; and PARA 988 ante.

4 Ibid s 17(1). For these purposes, a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any documents or records concerning the assets: ss 17(2), 39(2). The power conferred by s 17 is in addition to powers otherwise conferred on trustees, but is subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation: see s 26; and PARA 988 ante.

5 Ibid ss 16(2), 17(3).

6 As to custodian trustees see PARA 792 et seq ante.

7 Trustee Act 2000 ss 16(3), 17(4).

8 Ibid s 18 does not impose a duty on a sole trustee if that trustee is a trust corporation: s 25(2). For the meaning of 'trust corporation' see PARA 798 ante.

9 Ibid s 18(1).

10 Ibid s 18(2).

11 Ibid s 18(3).

12 Ibid s 18(4).

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## **992. Eligibility for appointment as nominee or custodian.**

Under the Trustee Act 2000, a person may not be appointed as a nominee or custodian<sup>1</sup> unless one of the following conditions is satisfied<sup>2</sup>:

- 201 (1) the person carries on a business which consists of or includes acting as a nominee or custodian<sup>3</sup>;
- 202 (2) the person is a body corporate which is controlled by the trustees<sup>4</sup>;
- 203 (3) the person is a body corporate recognised under the Administration of Justice Act 1985<sup>5</sup>.

The persons whom the trustees<sup>6</sup> may appoint as a nominee or custodian include: (a) one of their number, if that one is a trust corporation; or (b) two or more of their number, if they are to act as joint nominees or joint custodians<sup>7</sup>. The person appointed as nominee or custodian may also be appointed as custodian or nominee, as the case may be, or be authorised to exercise functions as the trustees' agent<sup>8</sup>.

The trustees of a charitable trust<sup>9</sup> which is not an exempt charity<sup>10</sup> must act in accordance with any guidance given by the Charity Commission<sup>11</sup> concerning the selection of a person for appointment as a nominee or custodian<sup>12</sup>.

<sup>1</sup> See under the Trustee Act 2000 s 16, s 17 or s 18: see PARA 991 ante. For the meaning of 'custodian' see PARA 991 note 4 ante.

<sup>2</sup> Ibid s 19(1).

<sup>3</sup> Ibid s 19(2)(a).

<sup>4</sup> Ibid s 19(2)(b). The question whether a body is controlled by trustees is to be determined in accordance with the Income and Corporation Taxes Act 1988 s 840 (see INCOME TAXATION vol 23(1) (Reissue) PARA 845): Trustee Act 2000 s 19(3).

<sup>5</sup> Ibid s 19(2)(c). The reference in the text is to a body corporate recognised under the Administration of Justice Act 1985 s 9 (as amended): see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq.

<sup>6</sup> See PARA 988 note 2 ante.

<sup>7</sup> Trustee Act 2000 s 19(5). This provision is subject to s 19(1) (see the text and note 2 supra) and s 19(4) (see the text and note 12 infra).

<sup>8</sup> See ibid s 19(6), (7).

<sup>9</sup> For the meaning of 'charitable trust' see PARA 931 note 6 ante.

<sup>10</sup> 'Exempt charity' has the same meaning as in the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 315): Trustee Act 2000 s 39(1).

<sup>11</sup> As to the Charity Commission see CHARITIES vol 8 (2010) PARAS 538-572.

<sup>12</sup> Trustee Act 2000 s 19(4) (amended by the Charities Act 2006 s 75(1), Sch 8 para 197).





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### **993. Terms of appointment of nominees and custodians.**

Under the Trustee Act 2000, the trustees<sup>1</sup> may generally appoint<sup>2</sup> a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine<sup>3</sup>. They may not, however, appoint a person to act as a nominee or custodian on any of the following terms unless it is reasonably necessary for them to do so<sup>4</sup>:

- 204 (1) a term permitting the nominee or custodian to appoint a substitute<sup>5</sup>;
- 205 (2) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary<sup>6</sup>;
- 206 (3) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest<sup>7</sup>.

1 See PARA 988 note 2 ante.

2 Ie under the Trustee Act 2000 s 16, s 17 or s 18: see PARA 991 ante.

3 Ibid s 20(1). This provision is subject to s 20(2) (see the text and note 4 infra) and to ss 29-32 (see PARAS 902-903, 932 ante). For the meaning of 'custodian' see PARA 991 note 4 ante.

4 Ibid s 20(2).

5 Ibid s 20(3)(a).

6 Ibid s 20(3)(b).

7 Ibid s 20(3)(c).

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**994. Application of provisions for review of and liability for agents, nominees and custodians.**

Under the Trustee Act 2000, there are statutory provisions relating to the review of and liability for agents, nominees and custodians<sup>1</sup> which apply whether they were authorised or appointed under that Act<sup>2</sup>, or whether they were authorised or appointed under any power conferred by the trust instrument or by any enactment or any provision of subordinate legislation<sup>3</sup>.

1     Ie the Trustee Act 2000 ss 22, 23: see PARAS 995-996 post. For the meaning of 'custodian' see PARA 991 note 4 ante.

2     Ie under *ibid* s 11 (see PARA 989 ante), s 16, s 17 or s 18 (see PARA 991 ante): see s 21(1).

3     See *ibid* s 21(2). If, however, the application of s 22 or s 23 is inconsistent with the terms of the trust instrument or the enactment or provision of subordinate legislation, then s 22 or s 23, as the case may be, does not apply: see s 21(3).

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### **995. Review of agents, nominees and custodians.**

The Trustee Act 2000 provides that while the agent, nominee or custodian<sup>1</sup> continues to act for the trust<sup>2</sup>:

- 207 (1) the trustees<sup>3</sup> must keep under review the arrangements under which the agent, nominee or custodian acts, and how those arrangements are being put into effect<sup>4</sup>;
- 208 (2) if circumstances make it appropriate to do so, the trustees must consider whether there is a need to exercise any power of intervention<sup>5</sup> that they have<sup>6</sup>; and
- 209 (3) if the trustees consider that there is a need to exercise such a power, they must do so<sup>7</sup>.

If an agent has been authorised to exercise asset management functions<sup>8</sup> the duty of review includes, in particular: (a) a duty to consider whether there is any need to revise or replace the policy statement<sup>9</sup>; (b) if the trustees consider that there is a need to revise or replace the policy statement, a duty to do so<sup>10</sup>; and (c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with<sup>11</sup>.

1 For the meaning of 'custodian' see PARA 991 note 4 ante.

2 Trustee Act 2000 s 22(1). As to the application of s 22 see PARA 994 ante.

3 See PARA 988 note 2 ante.

4 Trustee Act 2000 s 22(1)(a). This obligation means that the trustees must keep under review the question of whether the agent, nominee or custodian is a suitable person to act for the trust, and whether the terms of his appointment are appropriate.

5 'Power of intervention' includes a power to give directions to the agent, nominee or custodian and a power to revoke the authorisation or appointment: *ibid* ss 22(4), 39(2).

6 *Ibid* s 22(1)(b).

7 *Ibid* s 22(1)(c).

8 For the meaning of 'asset management functions' see PARA 990 note 7 ante.

9 Trustee Act 2000 s 22(2)(a). For the meaning of 'policy statement' see PARA 990 ante. The provisions of s 15(3), (4) apply to the revision or replacement of a policy statement under s 22 as they apply to the making of a policy statement under s 15 (see PARA 990 ante): s 22(3).

10 *Ibid* s 22(2)(b).

11 *Ibid* s 22(2)(c).

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### **996. Liability for agents, nominees and custodians.**

The Trustee Act 2000 provides that a trustee<sup>1</sup> is not liable for any act or default of an agent, nominee or custodian<sup>2</sup> unless he has failed to comply with the duty of care applicable to him<sup>3</sup>: (1) when entering into the arrangements under which the person acts as agent, nominee or custodian<sup>4</sup>; or (2) when carrying out his duty of review<sup>5</sup>.

If a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute<sup>6</sup> unless he has failed to comply with the duty of care applicable to him<sup>7</sup>: (a) when agreeing that term<sup>8</sup>; or (b) when carrying out his duty of review in so far as it relates to the use of the substitute<sup>9</sup>.

1 See PARA 988 note 2 ante.

2 Trustee Act 2000 s 23(1). As to the application of s 23 see PARA 994 ante. For the meaning of 'custodian' see PARA 991 note 4 ante.

3 See *ibid* ss 1, 2, Sch 1 para 3; and PARA 950 ante.

4 *Ibid* s 23(1)(a).

5 *Ibid* s 23(1)(b). As to the duty of review see s 22; and PARA 995 ante.

6 *Ibid* s 23(2).

7 See note 2 *supra*.

8 Trustee Act 2000 s 23(2)(a).

9 *Ibid* s 23(2)(b).

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### **997. Protection of third parties.**

The Trustee Act 2000 provides that a failure by the trustees<sup>1</sup> to act within the limits of their statutory powers<sup>2</sup> in authorising a person to exercise a function of theirs as an agent, or in appointing a person to act as a nominee or custodian<sup>3</sup>, does not invalidate the authorisation or appointment<sup>4</sup>. The trustees will, of course, be liable for any loss to the trust estate<sup>5</sup>.

1 See PARA 988 note 2 ante.

2 I.e the powers conferred by the Trustee Act 2000 Pt IV (ss 11-27): see PARA 988 et seq.

3 For the meaning of 'custodian' see PARA 991 note 4 ante.

4 Trustee Act 2000 s 24.

5 See PARA 954 et seq ante.

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### ***C. POWER TO EMPLOY AGENTS UNDER THE TRUSTEE ACT 1925***

#### **998. General power to employ agents.**

Where, on the date the Trustee Act 2000 came into force<sup>1</sup>, a person was already appointed an agent or attorney under the Trustee Act 1925<sup>2</sup>, the agent is to be treated as if he had been authorised to exercise functions under the Trustee Act 2000<sup>3</sup> and, if appropriate, as if he had also been appointed under Part IV of that Act<sup>4</sup> to act as custodian or nominee<sup>5</sup>.

1 As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

2 Ie the Trustee Act 1925 s 23(1) or (3) (repealed). Subject to s 69(2) (see PARA 603 ante), trustees, instead of acting personally, had power to employ and pay an agent, whether a solicitor, banker, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, including the receipt and payment of money, and were entitled to be allowed and paid all charges and expenses so incurred, and were not responsible for the default of any such agent if employed in good faith: s 23(1) (repealed). For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 Ie under the Trustee Act 2000 s 11: see PARA 989 ante.

4 Ie ibid Pt IV (ss 11-27).

5 Ibid s 40(2), Sch 3 para 5. As to the appointment of agents, nominees and custodians under the Trustee Act 2000 see PARAS 988-993 ante. As to non-statutory powers to employ agents generally see PARAS 1001-1004 post.

#### **UPDATE**

#### **998 General power to employ agents**

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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### **999. Employment of agents where the trust estate is abroad.**

Where, on the date the Trustee Act 2000 came into force<sup>1</sup>, a person was already appointed an agent or attorney under the Trustee Act 1925<sup>2</sup> in relation to property outside the United Kingdom<sup>3</sup>, the operation of the appointment is not affected by the repeal of the provision<sup>4</sup>.

1 As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

2 Trustee Act 1925 s 23(2) (repealed). This provision was mainly declaratory: see *Stuart v Norton* (1860) 14 Moo PAC 17. Subject to the terms of the trust instrument, trustees could appoint agents or attorneys to deal with trust property outside the United Kingdom, or to execute or exercise any discretion vested in the trustees in relation to any such property with such ancillary powers, and with and subject to such provisions and restrictions as they thought fit, including a power to appoint substitutes. A trustee was not, by reason only of having made such an appointment, responsible for any loss arising from it: see s 23(2) (repealed).

3 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

4 Trustee Act 2000 s 40(2), Sch 3 para 6.



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### **1000. Appointment of solicitor or banker to receive money or property.**

Where, on the date the Trustee Act 2000 came into force<sup>1</sup>, a solicitor<sup>2</sup> or banker was already appointed an agent under the Trustee Act 1925<sup>3</sup> to receive money or property, the agent is to be treated as if he had been authorised to exercise functions as an agent under the Trustee Act 2000<sup>4</sup> and, if appropriate, as if he had also been appointed under Part IV<sup>5</sup> of that Act to act as custodian or nominee<sup>6</sup>.

1 As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

2 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 Trustee Act 1925 s 23(3)(a), (b) (repealed). The solicitor had to be appointed by the trustee himself (*Re Hetling and Merton's Contract* [1893] 3 Ch 269 at 280, CA, per Lindley LJ), and, if there were several trustees, the solicitor had to be appointed by all the trustees (see *Re C Flower and Metropolitan Board of Works*, *Re M Flower and Metropolitan Board of Works* (1884) 27 ChD 592 at 596).

4 Ie under the Trustee Act 2000 s 11: see PARA 989 ante.

5 Ie *ibid* Pt IV (ss 11-27).

6 *Ibid* s 40(2), Sch 3 para 5. As to the meaning of 'custodian' see PARA 991 note 4 post. As to appointment of agents, nominees and custodians under the Trustee Act 2000 see PARAS 988-993 ante.

### **UPDATE**

### **1000 Appointment of solicitor or banker to receive money or property**

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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## **D. NON-STATUTORY POWERS TO EMPLOY AGENTS**

### **1001. General non-statutory power to employ agents.**

Independently of the statutory provisions to employ agents<sup>1</sup> and of any provisions in the instrument creating the trust<sup>2</sup>, a trustee may allow a co-trustee, or employ an accountant, bailiff, banker, broker, solicitor, workman or other agent, to act for him in the affairs of the trust, and to receive and hold trust money and property where he is obliged to do so by common usage and would, if he were a prudent man of business, do so in a similar affair of his own<sup>3</sup>.

In every case the trustee must select the agent prudently and in good faith<sup>4</sup> and may employ him only so far as the matter properly lies within his professional capacity or his position as agent<sup>5</sup>. The trustee should supervise him with common prudence and allow him to retain trust property only so long as the matter requires<sup>6</sup>.

A trustee cannot, however, divest himself of the trust by employing an agent, and may not, therefore, entrust the agent with duties to any extent which the agent is willing to undertake, or pay to him any remuneration which he sees fit to demand<sup>7</sup>.

1 See PARA 998 et seq ante.

2 As to provisions in the trust instrument see *Doyle v Blake* (1804) 2 Sch & Lef 231 at 245 per Lord Redesdale LC; *Shepherd v Harris*[1905] 2 Ch 310. The nomination in the trust instrument of a particular agent has always been held to relieve trustees from any responsibility for employing him in the absence of laches on their part (*Gibbs v Herring* (1692) Prec Ch 49; *Kilbee v Sneyd* (1828) 2 Mol 186 at 200), but a person nominated as agent has no right to compel the trustees to employ him (*Finden v Stephens* (1846) 2 Ph 142), or to continue him in employment (*Shaw v Lawless* (1838) 5 Cl & Fin 129, HL; *Belaney v Kelly* (1871) 19 WR 1171; *Foster v Elsley*(1881) 19 ChD 518; but see *Williams v Corbet* (1837) 8 Sim 349).

3 *Bonithon v Hockmore* (1685) 1 Vern 316; *A-G v Scott* (1750) 1 Ves Sen 413 at 417-418 per Lord Hardwicke LC; *Re Parsons, ex p Belchier, ex p Parsons* (1754) Amb 218; *Henderson v M'Iver* (1818) 3 Madd 275; *Clough v Bond* (1838) 3 My & Cr 490 at 497 per Lord Cottenham LC; *Wilks v Groom* (1856) 3 Drew 584; *Wilkinson v Bewick* (1858) 4 Jur NS 1010; *Benett v Wyndham* (1862) 4 De GF & J 259 at 263; *Re Bird, Oriental Commercial Bank v Savin*(1873) LR 16 Eq 203; *Speight v Gaunt*(1883) 9 App Cas 1, HL (broker); *Re Brier, Brier v Evison*(1884) 26 ChD 238, CA; *Learoyd v Whiteley*(1887) 12 App Cas 727 at 731, 734, HL; *Shepherd v Harris*[1905] 2 Ch 310; *Re Munton, Munton v West*[1927] 1 Ch 262, CA; *Re Lucking's Will Trusts, Renwick v Lucking*[1967] 3 All ER 726, [1968] 1 WLR 866. A trustee may employ an agent to collect small debts (*Re Brier, Brier v Evison* supra), and may remit or collect money through a bank and keep a bank account for the purpose in his name as a trustee (*Knight v Earl of Plymouth* (1747) 1 Dick 120; *Re Parsons, ex p Belchier, ex p Parsons* supra at 219 per Lord Hardwicke LC; *Wren v Kirton* (1805) 11 Ves 377; *Johnson v Newton* (1853) 11 Hare 160; *Fenwick v Clarke* (1862) 4 De GF & J 240). Where there are several trustees, the bank account must be in the names of all, and they may not authorise the bank to pay cheques signed by one of their number: *Clough v Bond* supra at 497-498; *Trutch v Lamprell* (1855) 20 Beav 116. A crossed cheque signed by all may, however, be entrusted to one of them for delivery to a beneficiary: *Re Lake Bathurst Australasian Gold Mining Co, Barnard v Bagshaw* (1862) 3 De GJ & Sm 355. A trustee may allow an auctioneer who sells trust property to receive the deposit money (*Edmonds v Peake* (1843) 7 Beav 239), and a solicitor to receive money on payment off of a mortgage (*Wyman v Paterson*[1900] AC 271 at 288, HL, per Lord Davey), but not to retain it unduly (*Wyman v Paterson* supra; *Williams v Byron* (1901) 18 TLR 172; *Re Sheppard, De Brimont v Harvey*[1911] 1 Ch 50). As to a trustee appointing an attorney to transact matters requiring discretion see PARAS 952, 987 ante; as to employing an agent to keep the accounts of the trust see PARA 961 note 1 ante; and as to the position where

the beneficiary acts as agent, and the running of time in these cases, see LIMITATION PERIODS vol 68 (2008) PARA 1202.

4 *Fry v Tapson*(1884) 28 ChD 268 at 281 per Kay J; *Re Weall, Andrews v Weall*(1889) 42 ChD 674 at 678 per Kekewich J; *Rochfort v Seaton*[1896] 1 IR 18 at 24-25 per Chatterton V-C; *Robinson v Harkin*[1896] 2 Ch 415 at 423-424 per Stirling J. Neither the creator of the trust nor the beneficiaries may dictate to a trustee what particular person he is to employ (*Shaw v Lawless* (1838) 5 Cl & Fin 129, HL; *Foster v Elsley*(1881) 19 ChD 518; *Re Duke of Cleveland's Settled Estates*[1902] 2 Ch 350); but see *Williams v Corbet* (1837) 8 Sim 349. He must select a broker or valuer himself and not leave the choice to his solicitors (*Fry v Tapson* supra at 281; *Robinson v Harkin* supra) and, when lending on mortgage, he should not employ as a valuer the agent of the mortgagor (*Fry v Tapson* supra).

5 *Rowland v Witherden* (1851) 3 Mac & G 568 at 574; *Fry v Tapson*(1884) 28 ChD 268 at 281; *Re Dewar, Dewar v Brooke* (1885) 33 WR 497; *Re Weall, Andrews v Weall*(1889) 42 ChD 674 at 678; *Robinson v Harkin*[1896] 2 Ch 415 at 423-424. See also PARAS 952, 987 ante.

6 *Matthews v Brise* (1843) 6 Beav 239 at 244 (affd (1845) 15 LJ Ch 39); *Wyman v Paterson*[1900] AC 271, HL; *Re Lucking's Will Trusts, Renwick v Lucking*[1967] 3 All ER 726, [1968] 1 WLR 866. A trustee must not leave trust money in a bank for an unduly long time: *Moyle v Moyle* (1831) 2 Russ & M 710; *Matthews v Brise* supra; *Challen v Shippam* (1845) 4 Hare 555; *Gibbins v Taylor* (1856) 22 Beav 344; *Rehden v Wesley* (1861) 29 Beav 213; *Cann v Cann* (1884) 51 LT 770.

7 *Re Weall, Andrews v Weall*(1889) 42 ChD 674 at 678. Where a trustee is under a court order allowed a commission for managing the trust estate and receiving the rents, he may not pay out of the trust fund a further commission to a rent collector employed by him: *Cox v Bennett* (1891) 39 WR 308, CA.

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## **1002. Receipt of income by one of several trustees.**

Trustees may allow one of their number to collect rents<sup>1</sup> and generally to receive the income of trust property<sup>2</sup>, and in some cases the income of the trust property is payable to one of them only<sup>3</sup>.

1 *Townley v Sherborn* (1634) J Bridg 35 at 37; *Gough v Smith* [1872] WN 18. The collecting trustee may not receive remuneration: *Home v Pringle and Hunter* (1841) 8 Cl & Fin 264, HL. Cf *Shepherd v Harris* [1905] 2 Ch 310. As to remuneration generally see PARA 930 et seq ante. If there is any fear of misappropriation of the rents by the collecting trustee, the other trustees should notify the tenants to discontinue paying to him: *Gough v Smith* supra.

2 *Williams v Nixon* (1840) 2 Beav 472; *Cottam v Eastern Counties Rly Co* (1860) 1 John & H 243.

3 Companies which do not recognise trusts pay the interest or dividends on stocks or shares to the first of several registered joint holders: see the Companies (Tables A to F) Regulations 1985, SI 1985/805, Schedule, Table A art 106; and COMPANIES vol 15 (2009) PARA 1415. The dividends on funds in court are sometimes ordered to be paid to one or two of several trustees: *Re Coulson's Settlement* (1867) 17 LT 27; *Milne v Gilbert* [1875] WN 128; *Re Pryor's Settlement Trusts* (1876) 35 LT 202; but see *Re Carr, Carr v Carr* (1888) 36 WR 688.

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### **1003. Custody of trust property and title deeds**

A trustee may leave trust property in the sole possession of a co-trustee where he is acting in the capacity of broker or agent of the trustees for that purpose<sup>1</sup>.

For the sake of convenience title deeds and documents may be kept by one of several co-trustees<sup>2</sup>.

<sup>1</sup> *Re Gasquoine, Gasquoine v Gasquoine* [1894] 1 Ch 470, CA.

<sup>2</sup> *Cottam v Eastern Counties Rly Co* (1860) 1 John & H 243; *Re Sisson's Settlement, Jones v Trappes* [1903] 1 Ch 262; *Welch v Bank of England* [1955] Ch 508 at 537-538, [1955] 1 All ER 811 at 824. As to the right of the trustees to custody of title deeds see PARA 729 ante; as to the protection of the trustees of a settlement who place documents of title in the possession of a tenant for life or statutory owner see SETTLEMENTS vol 42 (Reissue) PARA 892; and as to allowing securities and documents of title to be held by bankers or solicitors see PARA 1000 post.

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#### **1004. Liability for default of agent and liability on contract with agent.**

A trustee is not vicariously liable for the default of his agent<sup>1</sup> if he employs a properly qualified person<sup>2</sup>.

A trustee who employs a solicitor, auctioneer, broker or other agent in connection with the trust estate enters into a personal contract with him and is personally liable on it<sup>3</sup>. If, however, the contract is proper, having regard to the character and terms of the trust, the trustee has a right to be indemnified out of the trust estate in respect not merely of payments actually made, but of his liability under it<sup>4</sup>. He may, therefore, make any payments in respect of it out of the trust estate in the first instance<sup>5</sup>.

1 *Re Parsons, ex p Belchier, ex p Parsons* (1754) Amb 218; *Benett v Wyndham* (1862) 4 De GF & J 259; *Speight v Gaunt* (1883) 9 App Cas 1, HL; *Re Weall, Andrews v Weall* (1889) 42 ChD 674 at 678 per Kekewich J.

2 *Re Weall, Andrews v Weall* (1889) 42 ChD 674 at 678; *Re Duke of Cleveland's Settled Estate* [1902] 2 Ch 350 at 353 per Joyce J. For the exemption from liability of a trustee who signs a receipt for the sake of conformity and the confining of a trustee's liability to his own acts, receipts, neglects or defaults see PARA 1115 post.

3 *Stanier v Evans, Evans v Stanier* (1886) 34 ChD 470 at 476-477 per North J; *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370 at 376 per Stirling J. A solicitor employed by a trustee has no lien on the trust estate for his costs: *Stanier v Evans, Evans v Stanier* supra at 477.

4 *Stanier v Evans, Evans v Stanier* (1886) 34 ChD 470 at 477; *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370 at 376-377. As to a trustee's right of reimbursement and indemnity generally see PARA 902 et seq ante. As to bills of costs of solicitors see *Macnamara v Jones* (1784) 2 Dick 587; *Re Davis, Muckalt v Davis* [1887] WN 186; *Re Wellborne* [1901] 1 Ch 312, CA. As to the right of beneficiaries to have the costs of a solicitor employed by the trustees taxed under the Solicitors Act 1974 see LEGAL PROFESSIONS vol 66 (2009) PARA 966. See also *Re Story, ex p Marwick* (1859) 1 LT 16.

5 *Re Blundell, Blundell v Blundell* (1888) 40 ChD 370 at 377. Where a joint retainer is given, one trustee may retain the whole bill of costs out of the trust estate, notwithstanding that his co-trustee is indebted to the trust and is insolvent: *Watson v Row* (1874) LR 18 Eq 680; *McEwan v Crombie* (1883) 25 ChD 175. Cf *Smith v Dale* (1881) 18 ChD 516. See also LEGAL PROFESSIONS vol 66 (2009) PARA 774.

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### **(iii) Power to Invest**

#### **A. IN GENERAL**

#### **1005. General principles.**

The Trustee Act 2000 contains a very wide general power of investment<sup>1</sup> which applies in relation to trusts created before and after its commencement<sup>2</sup>. The provisions of the Act are normally of paramount importance. However the statutory power operates in addition to powers conferred on trustees imposed by the trust instrument<sup>3</sup> and is subject to any restrictions imposed by the trust instrument<sup>4</sup>. It is, therefore, always necessary to consider the terms of any express clause.

Certain non-statutory principles will continue to be relevant<sup>5</sup>.

1 See the Trustee Act 2000 s 3; and PARA 1012 post.

2 See *ibid* s 7; and PARA 1012 post.

3 *Ibid* s 6(1)(a).

4 *Ibid* s 6(1)(b).

5 Eg there is no statutory definition of 'investment': see PARA 1006 post.

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### **1006. The meaning of 'investment'.**

There is no statutory definition of 'investment'<sup>1</sup>. Originally an investment was regarded as something which must not only safeguard capital<sup>2</sup> but which would produce an income or profit<sup>3</sup>. However, it appears clear that today 'profit' can be in the form of capital appreciation rather than income yield<sup>4</sup>.

1 'The notion of what constitutes an investment is an evolving concept, to be interpreted by the courts. Trustees might . . . legitimately invest (depending on the circumstances of the trust) in antique silver or paintings in the expectation that they would increase in value': *Trustees' Powers and Duties* (Law Com no 260) (1999) PARA 2.28, footnote 56. The power of investment conferred by the Trustee Act 2000 permits trustees to invest so as to produce an income or capital return: Explanatory Notes to the Trustee Act 2000.

2 *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231 at 247 per Kekewich J.

3 'Invest' prima facie means to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield: *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58 at 65 per Lawrence J; *Moss' Trustees v King* 1952 SC 523 at 527. The purchase of freehold land for some purpose other than the receipt of income is not an investment: *Re Power, Public Trustee v Hastings* [1947] Ch 572, [1947] 2 All ER 282.

4 Investment property is property held by trustees for the purpose of generating money, whether from income or capital growth: see *Harries v Church Comrs for England* [1993] 2 All ER 300 at 304, [1992] 1 WLR 1241 at 1246 per Sir Donald Nicholls V-C.



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### 1007. Express investment provisions.

The instrument creating the trust may contain restrictions<sup>1</sup>. Subject to any express directions contained in that instrument<sup>2</sup>, and to any conditions prescribed by it<sup>3</sup>, the trustee may invest<sup>4</sup> the money in any manner authorised by it<sup>5</sup>, provided that in making the selection he uses proper care and caution, and avoids investments which are accompanied by risk<sup>6</sup>.

The court has power to vary the investment powers conferred by a trust instrument<sup>7</sup>.

The language of the trust instrument has traditionally been strictly construed; and, under a direction to trustees to invest the trust fund, or place out the trust fund at interest or on security, at their discretion, it has been held that they may only invest in proper trustee securities<sup>8</sup>.

In more modern circumstances courts have been, however, more ready to find that an express authority to invest in such investments as the trustees think fit entitles them to invest in such investments as they honestly think desirable, whether or not those investments are trustee investments under the relevant statutory provisions<sup>9</sup>.

In the absence of a clear express provision, trustees may not gear up the trust fund by borrowing on the security of trust property in order to acquire further property for the trust<sup>10</sup>.

1 The investment clause contained in the trust instrument may be so drawn eg as not to permit investment in some securities authorised by law for the investment of trust funds: see eg *Re Warren, Public Trustee v Fletcher* [1939] Ch 684, [1939] 2 All ER 599; *Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974. If the trust instrument directs and requires trustees to make some specified investment, they are under a duty to do so even if it is one of which they disapprove: *Beauclerk v Ashburnham* (1845) 8 Beav 322; *Cadogan v Earl of Essex* (1854) 2 Drew 227; *Re Hurst, Addison v Topp* (1890) 63 LT 665.

2 *Beauclerk v Ashburnham* (1845) 8 Beav 322; *Cadogan v Earl of Essex* (1854) 2 Drew 227.

3 A common condition is the consent of one or more of the beneficiaries, which may, generally speaking, be given either before or after the investment: *Stevens v Robertson* (1868) 37 LJ Ch 499 at 502 per Stuart V-C; but see *Bateman v Davis* (1818) 3 Madd 98. Where a beneficiary improperly withholds his consent, the court may dispense with it: *Costello v O'Rorke* (1869) IR 3 Eq 172 at 184; *Re Hart's Will Trusts, Hart v Hart* [1943] 2 All ER 557.

There are conflicting authorities as to whether a power of investment 'with the consent of X' gives X a beneficial power which he can use for his own benefit, or effectively release, or whether it gives X a fiduciary power which he should use in the interests of all the beneficiaries, and which he is unable to release. In the absence of a controlling context the former view is perhaps to be preferred: *Re Wise's Settlement, Wise v Hankey* (9 July 1954, unreported) discussed in (1954) 218 LT Jo 116, where Wynn-Parry J said that he preferred *Dicconson v Talbot* (1870) 6 Ch App 32 to *Re Massingberd's Settlement, Clark v Trelawney* (1890) 63 LT 296, CA. Cf *Wiles v Gresham* (1854) 2 Drew 258; affd 5 De GM & G 770.

5 *Re Whiteley, Whiteley v Learoyd* (1886) 33 ChD 347 at 358, CA, per Lopes LJ; on appeal sub nom *Learoyd v Whiteley* (1887) 12 App Cas 727 at 733, HL, per Lord Watson. The instrument may authorise an investment in foreign government bonds passing by delivery: *Arnould v Grinstead* (1872) 21 WR 155. A direction to invest in foreign government securities authorises an investment in the securities of a subordinate government, such as that of one of the states of the United States of America (*Cadett v Earle* (1877) 5 ChD 710), but a power to invest in the stocks or securities of a British colony or dependency does not authorise an investment in the stocks of a Canadian province (*Re Maryon-Wilson's Estate* [1912] 1 Ch 55, CA) or, since the Statute of Westminster 1931 came into force, in Canadian stocks generally (*Re Brassey's Settlement, Barclays Bank Ltd v Brassey* [1955] 1 All ER 577, [1955] 1 WLR 192; but see *Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974). Where a testator domiciled in England directed investment in 'South African securities

only', it was held that the trustees were not limited to investments authorised by English law and that they had power to invest in such investments as were regarded as suitable for investment by the courts of South Africa: *Re Sebba, Lloyds Bank Ltd v Hutson* [1959] Ch 166, [1958] 3 All ER 393. A direction to trustees to invest in 'such stocks shares and/or convertible debentures in the 'blue chip' category' as they should think fit has been held void for uncertainty: *Re Kolb's Will Trusts, Lloyds Bank Ltd v Ullman* [1962] Ch 531, [1961] 3 All ER 811. A direction to hold existing government securities includes government bonds passing by delivery: *Arnould v Grinstead* supra. A power to leave the fund with a particular firm at interest does not authorise its being so left after a change in the personnel of the firm: *Cummins v Cummins* (1845) 3 Jo & Lat 64; *Re Tucker, Tucker v Tucker* [1894] 1 Ch 724; *Smith v Patrick* [1901] AC 282, HL; *Re Morrison, Morrison v Morrison* [1901] 1 Ch 701. In powers of investment, 'public company' includes any company incorporated under the companies legislation (*Re Sharp, Rickett v Sharp* (1890) 45 ChD 286, CA; but see *Re Castlehow, Lamonby v Carter* [1903] 1 Ch 352), and 'a company incorporated by Act of Parliament' includes any company incorporated by charter granted under the authority of a general Act of Parliament (*Elve v Boyton* [1891] 1 Ch 501, CA), but does not include a company incorporated by registration under the companies legislation (*Re Smith, Davidson v Myrtle* [1896] 2 Ch 590). See also *R v Clowes (No 2)* [1994] 2 All ER 316, CA. A limited company registered and having its head office in the United Kingdom, where its board of directors meets to manage and control its affairs, is 'a company in the United Kingdom', even though the company's property is situated abroad and its operations are carried on abroad: *Re Hilton, Gibbes v Hale-Hinton* [1909] 2 Ch 548 at 551-552 per Neville J. 'Municipal corporation' does not include incorporated harbour trustees: *Hutton v Annan* [1898] AC 289, HL; *Wood v Middleton* (1898) 79 LT 155. A direction to invest in 'public stocks of the Bank of England' has been held to be a direction to invest in public stocks forming part of the national debt and transferable at the Bank of England: see *Re Hill, Fettes v Hill* [1914] WN 132. A reference to stock in an investment clause prima facie includes a reference to shares (*Re McEacharn's Settlement Trusts, Hobson v McEacharn* [1939] Ch 858), and a reference to shares prima facie includes a reference to stock (*Re Boys Will Trusts, Westminster Bank Ltd v Boys* [1950] 1 All ER 624).

6 *Re Whiteley, Whiteley v Learoyd* (1886) 33 ChD 347 at 353, CA; affd sub nom *Learoyd v Whiteley* (1887) 12 App Cas 727 at 733, HL. See also PARA 1031 post.

7 See PARA 1011 post.

8 *Dickonson v Player* (1838) Coop Pr Cas 178; *Harris v Harris* (1861) 29 Beav 107; *Bethell v Abraham* (1873) LR 17 Eq 24 at 27 per Jessel MR; *Re Kavanagh, Murphy v Doyle* (1892) 29 LR Ir 333, Ir CA; *Re Brown, Brown v Brown* (1885) 29 ChD 889 at 891. Where there is a direction to invest with power to vary investments as the trustees think fit, the range is limited to trustee investments: *Re Hazeldine, Public Trustee v Hazeldine* [1918] 1 Ch 433; but see *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58 (where trustees who were authorised to invest on investments of whatsoever nature as they should in their absolute discretion deem fit, and as if they were absolute owners, were held to be free to purchase real estate as an investment). A power to employ the trust property at discretion has a wider meaning than to invest at discretion: *Dickonson v Player* supra. See also *Re Hargreaves, Hick v Hargreaves* (1886) [1901] 2 Ch 547n.

9 *Re Harari's Settlement Trusts, Wordsworth v Fanshawe* [1949] 1 All ER 430; *Re Peczenik's Settlement Trusts, Cole v Ingram* [1964] 2 All ER 339, [1964] 1 WLR 720. Where trustees were authorised to invest in such securities as they might think fit, it was held that 'securities' included any stocks or shares or bonds by way of investment: *Re Douglas's Will Trusts, Lloyds Bank Ltd v Nelson* [1959] 2 All ER 620, [1959] 1 WLR 744; affd on another point [1959] 3 All ER 785, [1959] 1 WLR 1212, CA. See also *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 529, PC (cited in PARA 1010 note 4 post); *R v Clowes (No 2)* [1994] 2 All ER 316, CA.

10 *Re Suenson-Taylor's Settlement Trusts, Moores v Moores* [1974] 3 All ER 397, [1974] 1 WLR 1280.

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### **1008. Investment in purchase of land under express investment provisions.**

A power to a trustee to invest in the purchase of land does not authorise him to invest in the purchase of an equity of redemption<sup>1</sup> even though he is the authorised holder of a second mortgage on the property<sup>2</sup>; nor does such a power authorise a trustee to purchase a house for occupation by the tenant for life, as the valid exercise of a power to invest requires the receipt of income from the investment<sup>3</sup>.

In exercising his power the trustee must ascertain to the best of his ability the value of the property intended to be purchased, and must not purchase it at an excessive price<sup>4</sup>. He must take care to get the legal estate and a good title with the property, and must not purchase under conditions which preclude him from doing so<sup>5</sup>. He may purchase freehold ground rents<sup>6</sup>. He must not purchase property of such a nature as unduly to benefit or prejudice one beneficiary as compared with another<sup>7</sup>, and must not purchase property on speculation without having money in hand to pay for it at the time<sup>8</sup>.

1 *Worman v Worman* (1889) 43 ChD 296. Land purchased before 1 January 1997 is held on trust for sale unless the trust instrument otherwise provides: see the Law of Property Act 1925 s 32(1). This provision is repealed in relation to land purchased on or after 1 January 1997, whether the trust or will in pursuance of which it is purchased came into operation before or after that date, by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 2. See further SETTLEMENTS vol 42 (Reissue) PARA 950. For a contrary provision see *Re Hanson, Hanson v Eastwood* [1928] Ch 96.

2 *Worman v Worman* (1889) 43 ChD 296.

3 *Re Power, Public Trustee v Hastings* [1947] Ch 572, [1947] 2 All ER 282 (purchase of a house with vacant possession for the tenant for life and her children held to be unauthorised); *Moss Trustees v King* 1952 SC 523, 1952 SLT 362. See also *Re Wragg, Wragg v Palmer* [1919] 2 Ch 58; *Re Peczenik's Settlement Trusts, Cole v Ingram* [1964] 2 All ER 339, [1964] 1 WLR 720.

4 *Ingle v Partridge (No 2)* (1865) 34 Beav 411 at 412 per Romilly MR; *Fry v Tapson* (1884) 28 ChD 268. The trustee must not rely on a valuation by the vendor's valuer: *Ingle v Partridge (No 2)* supra at 412.

5 *Eastern Counties Rly Co v Hawkes* (1855) 5 HL Cas 331 at 363-364 per Lord Campbell. The trustee is, however, not chargeable with breach of trust only on the ground that in effecting the purchase he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require if the title accepted is such as a person acting with prudence and caution would have accepted: see the Trustee Act 1925 s 8(3) (repealed). Transitional provisions in the Trustee Act 2000 provide that the repeal of the Trustee Act 1925 s 8 does not affect its operation in relation to loans or investments made before the coming into force of that repeal: Trustee Act 2000 s 40(2), Sch 3 para 2. As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante. See also PARA 999 ante. As to the statutory powers of investment under the Trustee Act 2000 see PARA 1012 et seq post. As to the procedure for obtaining land improvement charges see AGRICULTURAL LAND vol 1 (2008) PARAS 624-636.

6 *Re Peyton's Settlement Trust* (1869) LR 7 Eq 463. Trustees empowered to invest in freehold or leasehold ground rents may purchase those ground rents: *Re Mordan, Legg v Mordan* [1905] 1 Ch 515, CA.

7 *Burges v Lamb* (1809) 16 Ves 174 at 178.

8 *Ecclesiastical Comrs v Pinney* [1899] 2 Ch 729; on appeal [1900] 2 Ch 736, CA.

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### **1009. Non-financial considerations.**

The duty of trustees to exercise their powers in the best interests of the present and future beneficiaries is paramount. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their financial interests<sup>1</sup>. It follows that a power of investment must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation have both to be considered in judging the return from the investment. In considering what investments to make, trustees must put on one side their own personal interests and views<sup>2</sup>. This does not mean that each individual trustee, in genuinely applying his mind and judgment to a trust decision, must divest himself of all personal preferences, of all political beliefs, and of all moral, religious and other conscientiously held beliefs. What he must do is to recognise that he has those preferences, commitments or principles, but nonetheless do his best to exercise fair and impartial judgement on the merits of the issues before him. If he realises that he cannot do so, he should abstain from participating in deciding the issue or, in the extreme case, resign as trustee<sup>3</sup>. Trustees are entitled, or even required, to take into account non-financial criteria where the trust instrument so provides<sup>4</sup>.

1 Exceptionally if, for example, the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainments, as well as armaments, it might not be for the benefit of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities than they would have received if the trustees had invested the trust funds in other investments: *Cowan v Scargill* [1985] Ch 270 at 288, [1984] 2 All ER 750 at 761 per Megarry V-C. For cases on the meaning of 'benefit' under the Variation of Trusts Act 1958 see PARA 1062 note 12 post.

2 *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750. See also *Harries v Church Comrs for England* [1993] 2 All ER 300, [1992] 1 WLR 1241 (applying a similar approach in the case of charity trustees).

3 *Martin v City of Edinburgh District Council* 1988 SLT 329, Ct of Sess.

4 *Harries v Church Comrs for England* [1993] 2 All ER 300 at 305, [1992] 1 WLR 1241 at 1247 per Sir Nicholls V-C.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(iii) Power to Invest/A. IN GENERAL/1010. Personal security.

### **1010. Personal security.**

The trust instrument may authorise investment on personal security<sup>1</sup>, including the security of the personal undertaking of an individual, as well as the security of personal property<sup>2</sup>. A loan of trust money on personal security, however, must be made in good faith and in the interests of the beneficiaries and not merely of the borrower<sup>3</sup>, and may not be made unless expressly authorised<sup>4</sup>.

It is thought that it would only be in exceptional circumstances that investment on personal security would satisfy the standard investment criteria under the Trustee Act 2000<sup>5</sup>.

1 *Re Laing's Settlement, Laing v Radcliffe* [1899] 1 Ch 593. The trustee may lend the trust money to the beneficiary for life if there is a reasonable prospect of repayment by him: *Re Laing's Settlement, Laing v Radcliffe* supra. As to the impropriety of a loan to a beneficiary to enable him to repay a debt to a trustee see *Molyneux v Fletcher* [1898] 1 QB 648. Where under a marriage settlement trustees are empowered with the consent of the wife to lend the trust money to the husband, it has been held that her consent cannot be given retrospectively (*Bateman v Davis* (1818) 3 Madd 98), and that her consent is necessary to every loan made to him from time to time and cannot be given prospectively, but that, unless the terms of her consent only authorise a loan for a limited time, the money may remain on loan to him indefinitely (*Child v Child* (1855) 20 Beav 50).

2 *Forbes v Ross* (1788) 2 Bro CC 430; *Pickard v Anderson* (1872) LR 13 Eq 608.

3 *Langston v Ollivant* (1807) Coop G 33.

4 *Ryder v Bickerton* (1743) 3 Swan 80 note (a); *Holmes v Dring* (1788) 2 Cox Eq Ca 1; *Pocock v Reddington* (1801) 5 Ves 794 at 799 per Arden MR; *Walker v Symonds* (1818) 3 Swan 1 at 63 per Lord Eldon LC; *Mills v Osborne* (1834) 7 Sim 30; *Styles v Guy* (1849) 1 Mac & G 422 at 431. In *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 529, PC, where trustees were authorised to invest in such investments as they in their absolute discretion thought fit, they were held not entitled to lend an interest on a mere personal contract to pay, but entitled to lend at interest upon the security of deposited jewellery. See also *Re Peczenik's Settlement Trusts, Cole v Ingram* [1964] 2 All ER 339, [1964] 1 WLR 720.

5 As to the standard investment criteria see the Trustee Act 2000 s 4(3); and PARA 1013 post.

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### 1011. Variation of investment clauses by the court.

A variation of the investment powers conferred by a trust instrument may be sanctioned by the court under the power to authorise dealings with trust property conferred by the Trustee Act 1925<sup>1</sup>, or under the Variation of Trusts Act 1958<sup>2</sup>. The powers of a court<sup>3</sup> to confer wider powers of investment on trustees were not lessened by the enlargement of investment powers conferred by the Trustee Investments Act 1961, and the extent to which any such power of the court may be exercised is unaffected by that Act<sup>4</sup>. Nor is there anything in the Trustee Act 2000 which would affect any such power of the court<sup>5</sup>. However, the width of the statutory power contained in the Trustee Act 2000<sup>6</sup> means that the need to apply to court for extensions of express powers is now much reduced.

1 See the Trustee Act 1925 s 57; and PARA 1061 post. Under s 57, the court can undoubtedly authorise the investment of particular money in particular securities not authorised by the trust instrument, but some doubt exists as to how far the court can confer a general power to invest in securities of a class not authorised (*Re Coates' Will Trusts* [1959] 2 All ER 47n at 54n, [1959] 1 WLR 375 at 378; and see *Re Royal Society's Charitable Trusts, Royal Society v A-G* [1956] Ch 87 at 91, [1955] 3 All ER 14 at 15), although in certain instances orders conferring such a power have been made (see *Re Brassey's Settlement, Barclays Bank Ltd v Brassey* [1955] 1 All ER 577 at 580, [1955] 1 WLR 192 at 196 (authority to invest in shares of banking companies in any British Dominion); *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society Charity* [1959] Ch 220 at 228, [1958] 3 All ER 465 at 467-468 (charitable trust)). See also *Re Kolb's Will Trusts, Lloyds Bank Ltd v Ullman* [1962] Ch 531 at 539, [1961] 3 All ER 811 at 815; *Mason v Farbrother* [1983] 2 All ER 1078. Where an application under the Variation of Trusts Act 1958 s 1 (as amended) (see PARAS 1062-1063 post) is appropriate, eg where all the beneficiaries who are sui juris are willing to consent to the variation, some cases suggest that trustees who seek generally to extend their investment powers should apply under s 1 (as amended) rather than under the Trustee Act 1925 s 57: see *Re Coates' Will Trusts* supra; *Re Byng's Will Trusts* [1959] 2 All ER 47n at 55n, [1959] 1 WLR 375 at 381 per Vaisey J. However, it has since been said that, where the beneficial interests under a will or settlement were unaffected, an application for extension of investment powers should be brought under the Trustee Act 1925 s 57 rather than under the Variation of Trusts Act 1958: *Anker-Petersen v Anker-Petersen* [1991] 16 LS Gaz R 32.

2 See the Variation of Trusts Act 1958 s 1 (as amended); and PARAS 1062-1063 post. In a number of cases the court has approved the variation of investment clauses contained in trust instruments under the powers conferred by the Variation of Trusts Act 1958: see eg *Re Coates' Will Trusts* [1959] 2 All ER 47n, [1959] 1 WLR 375; *Re Warburton's Settlement Trusts* (1960) Times, 15 January; *Re Thompson's Will Trusts* [1960] 3 All ER 378n, [1960] 1 WLR 1165. In such cases, words may be added to the existing investment clause or the whole investment clause may be redrafted by including what is worth retaining of the existing clause and adding the new powers; the latter has been said to be the more convenient course in the majority of cases: *Re Byng's Will Trusts* [1959] 2 All ER 47n at 57n, [1959] 1 WLR 375 at 382. It seems that on an application under the Variation of Trusts Act 1958 relating to the variation of investment powers, the court will not normally make an interim order, as distinct from a final order, enlarging powers of investment: see *Re Lloyd's Will Trusts* (1960) 110 L Jo 476, distinguishing *Re Royal Naval and Royal Marine Children's Homes, Portsmouth, Lloyds Bank Ltd v A-G* [1959] 2 All ER 716n, [1959] 1 WLR 755 (variation of charitable trusts by way of scheme: see note 3 infra). On an application under the Variation of Trusts Act 1958, or by a charity, relating to the variation of investment powers it is not necessary to file evidence by a stockbroker or other expert containing general matters of economic or financial history or arguments in general terms as to the wisdom of extending powers of investment, but this does not preclude the filing of expert evidence relating to matters peculiar to the particular application which an applicant is advised should be brought to the court's attention: *Re Allen's Settlement, Allen v Allen (Practice Note)* [1959] 3 All ER 673n, [1960] 1 WLR 6n. As to evidence on applications under the Variation of Trusts Act 1958 generally see PARA 1065 post.

3 In addition to the statutory powers mentioned in the text and notes 1-2 supra, the court has a limited inherent jurisdiction to modify or vary trusts: see PARA 1060 post. The court has also a jurisdiction to vary the investment powers of a charity by means of a scheme: see *Re Royal Society's Charitable Trusts, Royal Society v*

*A-G* [1956] Ch 87, [1955] 3 All ER 14; *Re Royal Naval and Royal Marine Children's Homes, Portsmouth, Lloyds Bank Ltd v A-G* [1959] 2 All ER 716n, [1959] 1 WLR 755 (where an interim order was made until the coming into force of what is now the Trustee Investments Act 1961). As to schemes relating to charities generally, and as to the power to bring into effect schemes for common investment funds by charities, see CHARITIES. As to evidence on an application for varying a charity's investment powers see note 2 *supra*.

4 Trustee Investments Act 1961 s 15 (repealed except in so far as s 15 is applied by or under any other enactment). Originally, the court's statutory powers of variation were not exercised so as to confer wider investment powers than those conferred by the Trustee Investments Act 1961 unless special circumstances were shown: see *Re Kolb's Will Trusts, Lloyds Bank Ltd v Ullman* [1962] Ch 531, [1961] 3 All ER 811; *Re Cooper's Settlement, Cooper v Cooper* [1962] Ch 826, [1961] 3 All ER 636. This is no longer the case: see *Trustees of the British Museum v A-G* [1984] 1 All ER 337, [1984] 1 WLR 418. See also *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167 (no restriction on nature of investments).

5 The general power of investment contained in the Trustee Act 2000 s 3: see PARA 1012 post. For the application of the general power of investment to existing trusts see PARA 1012 note 8 post.

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## **B. STATUTORY POWERS OF INVESTMENT UNDER THE TRUSTEE ACT 2000**

### **1012. The general power of investment.**

Part II of the Trustee Act 2000<sup>1</sup> is revolutionary in that it replaces the previous system, under which a trustee was only permitted to make specified authorised investments<sup>2</sup>, by one under which a trustee<sup>3</sup> may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust<sup>4</sup>. This is called 'the general power of investment'<sup>5</sup>. The general power of investment does not, however, permit a trustee to make investments in land other than in loans secured on land<sup>6</sup>.

The general power of investment is in addition to powers otherwise conferred on trustees<sup>7</sup>, but is subject to any restriction or exclusion imposed by the trust instrument, or by any enactment or any provision of subordinate legislation<sup>8</sup>. When exercising any power of investment<sup>9</sup> trustees are subject to the statutory duty of care<sup>10</sup>.

1    Ie the Trustee Act 2000 Pt II (ss 3-7). Part II applies in relation to trusts whether created before or after its commencement: s 7(1). As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

2    See the Trustee Act 1925 Pt I (ss 2-11) (repealed); the Trustee Investments Act 1961; and PARA 1007 et seq ante.

3    The Trustee Act 2000 Pt II does not apply to trustees of authorised unit trusts (s 37(1)) or to trustees managing a fund under a common investment scheme made, or having effect as if made, under the Charities Act 1993 s 24 (see CHARITIES vol 8 (2010) PARA 419) (other than such a fund the trusts of which provide that property is not to be transferred to the fund except by or on behalf of a charity the trustees of which are the trustees appointed to manage the fund) or to trustees managing a fund under a common deposit scheme made, or having effect as if made, under s 25 (see CHARITIES vol 8 (2010) PARA 420): Trustee Act 2000 s 38. For the meaning of 'authorised unit trust' see PARA 988 note 2 ante. Nothing in Pt II applies to the trustees of any pension scheme: see s 36(3). Pension scheme trustees have the power to invest as if they were absolutely entitled to the assets: see the Pensions Act 1995 s 34(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 803. For the meaning of 'pension scheme' see PARA 949 note 1 ante.

4    Trustee Act 2000 s 3(1).

5    Ibid s 3(2).

6    Ibid s 3(3). A person invests in a loan secured on land if he has rights under any contract under which: (1) one person provides another with credit; and (2) the obligation of the borrower to repay is secured on land: s 3(4). 'Credit' includes any cash loan or other financial accommodation (s 3(5)); and 'cash' includes money in any form (s 3(6)). The Trustee Act 1925 s 8 and s 9 (protection for trustees complying with certain conditions who lent money on mortgage) continue to apply as regards loans made before 1 February 2001: Trustee Act 2000 Sch 3 paras 2, 3. Much of the guidance on advice contained in the Trustee Act 1925 s 8 is likely to continue to be helpful to trustees lending on mortgage: ie lending only on the advice of an able practical surveyor or valuer instructed and employed independently of any owner of the property and lending no more than two-thirds of the valuation of the property. See also *Shaw v Cates*[1909] 1 Ch 389. Trustees should not be content with an out-of-date valuation: *Macleod v Annesley* (1853) 16 Beav 600; *Re Godfrey, Godfrey v Faulkner*(1883) 23 ChD 483. If trustees do not employ a local valuer, they must show circumstances to explain their selection: *Budge v Gummow*(1872) 7 Ch App 719. As to the acquisition of land see the Trustee Act 2000 Pt III (ss 8-10); and PARA 1034 post.

7    Ibid s 6(1)(a).



8 Ibid s 6(1)(b). An enactment or a provision of subordinate legislation is not to be regarded as being, or as being part of, a trust instrument: see s 6(2); and PARA 931 note 1 ante. For the meanings of 'enactment' and 'subordinate legislation' see PARA 903 note 2 ante.

No provision relating to the powers of a trustee contained in a trust instrument made before 3 August 1961 is to be treated for the purposes of s 6(1)(b) as restricting or excluding the general power of investment: s 7(2). A provision contained in a trust instrument made before the commencement of Pt II which has effect under the Trustee Investments Act 1961 s 3(2) as a power to invest under that Act, or which confers a power to invest under that Act, is to be treated as conferring the general power of investment on a trustee: Trustee Act 2000 s 7(3). The Trustee Investments Act 1961 s 3(2) is repealed, except in so far as it relates to a trustee having a power of investment conferred under an enactment passed before 3 August 1961 and which is not amended by the Trustee Act 2000 Sch 2.

9 Ie whether arising under ibid Pt II or otherwise.

10 See ibid ss 1, 2, Sch 1; and PARA 949 ante.

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### **1013. Standard investment criteria.**

The Trustee Act 2000<sup>1</sup> provides that in exercising any power of investment<sup>2</sup> a trustee must have regard to the standard investment criteria<sup>3</sup>. The standard investment criteria, in relation to a trust, are:

- 210 (1) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind<sup>4</sup>; and
- 211 (2) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust<sup>5</sup>.

The Trustee Act 2000 also requires a trustee to review the investments of the trust from time to time and to consider whether, having regard to the standard investment criteria, they should be varied<sup>6</sup>.

1 These provisions apply in relation to trusts whenever they were created: see PARA 1012 note 1 ante.

2 Ie whether arising under the Trustee Act 2000 Pt II (ss 3-7) or otherwise.

3 Ibid s 4(1).

4 Ibid ss 4(3)(a), 39(2). It is thought that 'suitability' includes considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth to meet the needs of the trust; and that it also includes any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make.

5 Ibid ss 4(3)(b), 39(2).

6 Ibid s 4(2).

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#### **1014. Duty to obtain and consider proper advice.**

Before exercising any power of investment<sup>1</sup> a trustee must (unless the exception applies)<sup>2</sup> obtain and consider proper advice<sup>3</sup> about the way in which, having regard to the standard investment criteria, the power should be exercised<sup>4</sup>. When reviewing the investments of the trust, a trustee must (unless the exception applies)<sup>5</sup> obtain and consider proper advice<sup>6</sup> about whether, having regard to the standard investment criteria, the investments should be varied<sup>7</sup>.

1     le whether arising under Trustee Act 2000 Part II (ss 3-7) or otherwise.

2     A trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so: *ibid* s 5(3).

3     Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment: *ibid* s 5(4). The Law Commission did not think it was necessary to impose specific restrictions on who should be eligible to give advice nor that the evidence should have to be given or confirmed in writing: see *Trustees' Powers and Duties* (Law Com no 260) (1999) PARA 2.34.

4     Trustee Act 2000 s 5(1).

5     See note 2 *supra*.

6     See note 3 *supra*.

7     Trustee Act 2000 s 5(2).

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**1015. Application of powers of investment under Trustee Act 2000 to persons other than trustees.**

The statutory power of investment<sup>1</sup> is extended to a range of bodies that are not trustees<sup>2</sup> which have investment powers under various public general Acts.

1 See the Trustee Act 2000 s 3; and PARA 1012 ante.

2 Ibid s 40, Sch 2 Pt 2.

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## **1016. Transitional provisions and savings.**

The repeal of certain provisions of the Trustee Act 1925 and the Trustee Investments Act 1961 does not affect the operation of those provisions under specified circumstances<sup>1</sup>.

A trustee who lent money before 1 February 2001<sup>2</sup> on the security of property on which he could properly lend is not chargeable with breach of trust if certain conditions are satisfied<sup>3</sup>.

Where a trustee improperly advanced trust money before 1 February 2001<sup>4</sup> on a mortgage which would have been a proper investment for a smaller sum, the security is deemed an authorised investment for the smaller sum, and the trustee is only liable to make good the excess sum with interest<sup>5</sup>.

A banker or banking company who held bearer securities<sup>6</sup> and documents<sup>7</sup> before 1 February 2001<sup>8</sup> is treated as if he or it had been appointed a custodian<sup>9</sup> under the Trustee Act 2000<sup>10</sup>.

A person appointed agent or attorney<sup>11</sup> before 1 February 2001<sup>12</sup> is treated as if he had been appointed an agent<sup>13</sup> under the Trustee Act 2000<sup>14</sup>. An appointment of an agent in respect of property outside the United Kingdom<sup>15</sup> made before 1 February 2001<sup>16</sup> is not affected by the repeal of the statutory power to appoint such agents<sup>17</sup>.

A trustee is not liable for breach of trust merely because he continues to hold a perpetual rentcharge<sup>18</sup>. A person who is not a trustee and before 1 February 2001<sup>19</sup> had powers to invest in a perpetual rentcharge<sup>20</sup> and on 1 February 2001<sup>21</sup> acquired the general power of investment is not treated as exceeding his powers of investment merely because he continues to hold the rentcharge<sup>22</sup>.

1 See the Trustee Act 2000 s 40, Sch 2 paras 1-6.

2 Ie the commencement of the Trustee Act 2000: see PARA 603 note 9 ante.

3 See the Trustee Act 1925 s 8 (repealed, except in relation to loans or investments made before the coming into force of the Trustee Act 2000 s 40, Sch 2 para 18); and the Trustee Act 2000 Sch 3 para 2. The trustee is not liable by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made if it appears to the court that: (1) the trustee, in making the loan, was acting on a report as to the value of the property made by a person he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situated or elsewhere; and (2) the amount of the loan did not exceed two third parts of the value of the property as stated in the report; and (3) the loan was made under the advice of the surveyor or valuer: Trustee Act 1925 s 8(1) (repealed); Trustee Act 2000 Sch 3 para 2.

A trustee lending money on the security of any leasehold property is not chargeable with breach of trust by reason only that in making the loan he dispensed either wholly or partly with the production or investigation of the lessor's title: Trustee Act 1925 s 8(2) (repealed); Trustee Act 2000 Sch 3 para 2.

A trustee is not chargeable with breach of trust by reason only that in effecting the purchase, or in lending money upon the security, of any property he accepted a shorter title than that which a purchaser is, in the absence of a special contract, entitled to require if, in the opinion of the court, the title accepted was one which a person acting with prudence and caution would have accepted: Trustee Act 1925 s 8(3) (repealed); Trustee Act 2000 Sch 3 para 2. See also *Re Walker*, *Walker v Walker* (1890) 59 LJ Ch 386; *Re Somerset*, *Somerset v Earl Poulett* [1894] 1 Ch 231; *Re Dive*, *Dive v Roebuck* [1909] 1 Ch 328; *Shaw v Cates* [1909] 1 Ch 389. If a valuer properly appointed makes his valuation on a wrong principle, the trustees, having employed a skilled agent, are not liable: *Re Pearson*, *Oxley v Scarth* (1884) 51 LT 692. A surveyor's fee for the report should not be dependent on the transaction being carried through: *Marquis of Salisbury v Keymer* (1909) 25 TLR 278. If the trustee

neglects to obtain such a report, he may be held liable for a deficiency in the security if he trusted the mortgagor's valuer (*Waring v Waring* (1852) 3 I Ch R 331; *Ingle v Partridge (No 2)* (1865) 34 Beav 411; *Fry v Tapson* (1884) 28 ChD 268; *Walcott v Lyons* (1886) 54 LT 786), or if he did not employ and properly instruct a valuer and surveyor of his own (*Waring v Waring* supra; *Fry v Tapson* supra; *Re Olive, Olive v Westerman* (1886) 34 ChD 70; *Re Somerset, Somerset v Earl Poulett* supra; *Waite v Parkinson* (1901) 85 LT 456; *Shaw v Cates* supra; *Re Solomon, Nore v Meyer* [1912] 1 Ch 261 (compromised on appeal [1913] 1 Ch 200, CA)), or if he advanced more than one-half of the value in the case of house property (*Stickney v Sewell* (1835) 1 My & Cr 8; *Macleod v Annesley* (1853) 16 Beav 600; *Stretton v Ashmall* (1854) 3 Drew 9; *Fry v Tapson* supra at 279; *Smethurst v Hastings* (1885) 30 ChD 490 at 498 per Bacon V-C; *Re Olive, Olive v Westerman* supra; *Re Salmon, Priest v Uppleby* (1889) 42 ChD 351 at 364 et seq, CA) or more than two-thirds in the case of other property (*Stickney v Sewell* supra; *Macleod v Annesley* supra; *Re Godfrey, Godfrey v Faulkner* (1883) 23 ChD 483; *Re Medland, Eland v Medland* (1889) 41 ChD 476 at 481, CA, per North J). As to the proper amount to advance in the case of trade property see *Stretton v Ashmall* supra; *Budge v Gummow* (1872) 7 Ch App 719; *Walcott v Lyons* (1886) 54 LT 786; *Learoyd v Whiteley* (1887) 12 App Cas 727, HL; *Palmer v Emerson* [1911] 1 Ch 758. As to leaseholds see *Hoey v Green* (1884) 1 TLR 116. As to the measure of damages where a valuer negligently makes a wrong valuation see *Baxter v FW Gapp & Co Ltd and Gapp* [1939] 2 KB 271, [1939] 2 All ER 752, CA; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA.

4 See note 3 supra.

5 Trustee Act 1925 s 9 (repealed, except in relation to any advance of trust money before 1 February 2001); Trustee Act 2000 Sch 3 para 3.

6 Ie under the Trustee Act 1925 s 7(1) (repealed).

7 Ie under ibid s 21 (repealed).

8 Ie the day on which the Trustee Act 2000 Pt IV (ss 11-27) came into force (see note 2 supra).

9 Ie a custodian of the securities under ibid s 18 (see PARA 991 ante) and of the documents under s 17 (see PARA 991 ante).

10 See ibid Sch 3 paras 1, 4.

11 Ie under the Trustee Act 1925 s 23(1) or (3) (s 23 repealed, except in so far as it does not affect the operation of an appointment made under s 23 before 1 February 2001).

12 See note 8 supra.

13 Ie authorised to exercise functions as an agent under the Trustee Act 2000 s 11 (see PARA 989 ante) and, if appropriate, to act as custodian or nominee under Pt IV.

14 Ibid Sch 3 para 5.

15 Ie under the Trustee Act 1925 s 23(2) (repealed: see note 11 supra).

16 See note 8 supra.

17 Trustee Act 2000 Sch 3 para 6. See PARA 999 ante.

18 Ibid Sch 3 para 7(1). A perpetual rentcharge is one acquired by virtue of the Trustee Investments Act 1961 Sch 1 Pt II para 14 (repealed, except in so far as it is applied by or under any other enactment).

19 Ie before the commencement of the Trustee Act 2000 Pt II (ss 3-7) (see note 2 supra).

20 Ie under the Trustee Investments Act 1961 Sch 1 Pt II para 14 (repealed: see note 18 supra).

21 See note 19 supra.

22 Trustee Act 2000 Sch 3 para 7(2). See note 18 supra.

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### ***C. STATUTORY POWERS OF INVESTMENT UNDER THE TRUSTEE INVESTMENTS ACT 1961***

#### **(A) SUBSTANTIAL REPEAL OF**

#### **1017. Repeal of Trustee Investments Act 1961.**

The Trustee Investments Act 1961 was substantially repealed by the Trustee Act 2000<sup>1</sup>. However, it was not possible to repeal the Act as a whole<sup>2</sup> and, therefore, many provisions are repealed except:

- 212 (1) in so far as certain provisions<sup>3</sup> are applied by or under any other enactment<sup>4</sup>; and
- 213 (2) in so far as certain provisions<sup>5</sup> relate to a trustee having a power of investment conferred on him under an enactment passed before the passing of the Trustee Investments Act 1961<sup>6</sup> which is not amended<sup>7</sup> by the Trustee Act 2000<sup>8</sup>.

Certain provisions remain in force<sup>9</sup>.

1 See the Trustee Act 2000 s 40(3), Sch 4 Pt 1.

2 See *Trustees' Powers and Duties* (Law Com no 260) (1999) PARA 2.22. See also *Trustees' Powers and Duties* (Law Com no 172) (1999) PARA 2.23, footnote 41.

3 Ie the Trustee Investment Act 1961 ss 1, 2, 5, 6, 12, 13, 15 (see PARA 1020 et seq post).

4 Trustee Act 2000 s 40(1), (3), Sch 2 Pt I para 1(1), Sch 4 Pt 1.

5 Ie the Trustee Investments Act 1961 s 3 and Schs 2, 3.

6 Ie 3 August 1961.

7 Ie by the Trustee Act 2000 s 40(1), Sch 2.

8 Ibid s 40(1), (3), Sch 2 Pt 1 para 1(2), Sch 4 Pt 1.

9 Ie the Trustee Investments Act 1961 ss 4, 7, 11, 17.

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### **1018. Restrictions on powers under Trustee Investments Act 1961.**

Under the Trustee Investments Act 1961<sup>1</sup>, no provision relating to a trustee's<sup>2</sup> powers of investment contained in any instrument, not being an enactment or an instrument made under an enactment, made before 3 August 1961<sup>3</sup> is capable of limiting the powers of investment which the Act confers<sup>4</sup>, but those powers are exercisable only in so far as a contrary intention is not expressed<sup>5</sup> in any Act or instrument made under an enactment, whenever passed or made, relating to the trustee's powers of investment or in any other instrument so relating which is made on or after 3 August 1961<sup>6</sup>.

1 Except where the context otherwise requires, expressions in the Trustee Investments Act 1961 have the same meaning as in the Trustee Act 1925: Trustee Investments Act 1961 s 17(4). The Trustee Investments Act 1961 applies to funds held by a corporation in trust for a charity: see *Re Manchester Royal Infirmary, Manchester Royal Infirmary v A-G* (1889) 43 ChD 420.

2 I.e. a person having trustee investment powers. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante. As to the application of the Trustee Investments Act 1961 to persons other than trustees having trustee investment powers and to special cases see PARA 1019 post.

3 I.e. the date of the passing of the Trustee Investments Act 1961.

4 I.e. the powers conferred by *ibid* s 1 (repealed with savings: see PARA 1017 ante): see PARA 1020 et seq post.

5 It seems that 'only in so far as a contrary intention is not expressed' is to be construed as 'unless expressly forbidden': see *Re Warren, Public Trustee v Fletcher* [1939] Ch 684 at 688, [1939] 2 All ER 599 at 602; *Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974. Both those cases were decisions in relation to investment on the meaning of the words 'unless a contrary intention is expressed in the instrument, if any, creating the trust', contained in the Trustee Act 1925 s 69(2). That expression was held in those two cases to have the same force as 'unless expressly forbidden by the instrument, if any, creating the trust' in the Trustee Act 1893 s 1 (repealed). For cases under that Act see *Re Owthwaite, Owthwaite v Taylor* [1891] 3 Ch 494; *Re Maire, Maire v De la Batut* (1905) 49 Sol Jo 383; *Re Burke, Burke v Burke* [1908] 2 Ch 248; *Re Hill, Fettes v Hill* [1914] WN 132. Cf *Re Westby* [1932] IR 444.

6 Trustee Investments Act 1961 s 1(3) (repealed with savings: see PARA 1017 ante).



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## (B) APPLICATION OF

### **1019. Application of Trustee Investments Act 1961.**

Where any persons, not being trustees, have a statutory power<sup>1</sup> of making investments which is or includes power, however expressed:

- 214 (1) to make the like investments as were authorised by the enactment which formerly specified the investments which were authorised trustee investments<sup>2</sup>; or
- 215 (2) to make the like investments as trustees are for the time being authorised by law to make<sup>3</sup>,

the statutory provisions which govern the powers of investment of trustees<sup>4</sup> apply with the necessary modifications in relation to those persons as if they were trustees<sup>5</sup>.

1 For these purposes, 'statutory power' means a power conferred by an enactment passed before 3 August 1961 (ie the date of the passing of the Trustee Investments Act 1961) or by any instrument made under any such enactment: see the Trustee Investments Act 1961 s 7(3). As to the statutory powers of investment under the Trustee Act 2000 see PARA 1012 et seq ante. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

2 Ibid s 7(1)(a). The enactment referred to in the text is the Trustee Act 1925 s 1 (repealed with savings: see PARA 1017 ante).

3 Trustee Investments Act 1961 s 7(1)(b).

4 Ie ibid ss 1-6 (s 4 as amended; ss 1-3, 5-6 repealed with savings: see PARA 1017 ante): see PARA 1020 et seq ante.

5 Ibid s 7(1). Property belonging to a consolidated loans fund, or any other fund applicable wholly or partly for the redemption of debt, may not by virtue of ss 1-6 (s 4 as amended; ss 1-3, 5-6 repealed with savings: see PARA 1017 ante) be invested or held invested in any manner specified in Sch 1 Pt II para 6 (see PARA 1023 head (9) post) or in wider-range investments (see PARA 1024 post): s 7(1) proviso. For these purposes, 'consolidated loans fund' means a loans fund established under the Local Government Act 1958 s 55 (repealed): see the Trustee Investments Act 1961 s 7(3). The Local Government Act 1958 s 55 (repealed) was replaced by the Local Government Act 1972 s 172, Sch 13 para 15, which has now also been repealed. As to borrowing powers of local authorities see now the Local Government Act 2003 Part 1 (ss 1-9); and LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 594 et seq.

Where, in the exercise of powers conferred by any enactment, an authority to which the Trustee Investments Act 1961 Sch 1 Pt II para 9 (as amended; repealed with savings: see PARA 1017 ante) (see PARA 1023 head (11) post) applies uses money belonging to any fund for a purpose for which the authority has power to borrow, then ss 1-6 (s 4 as amended; repealed with savings: see PARA 1017 ante), as applied by s 7(1), apply as if there were comprised in the fund (in addition to its actual content) property, being narrower-range investments (see PARA 1021 post), having a value equal to so much of that money as for the time being has not been repaid to the fund, and accordingly any repayment of that money to the fund is not to be treated for investment purposes as an accrual of property to the fund: s 7(2). An authority is not, however, required to comply with s 6 (repealed except in so far as applied by or under any other enactment) (see PARA 1027 post) in relation to the exercise of such powers: s 7(2) proviso.

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## (C) NARROWER-RANGE AND WIDER-RANGE INVESTMENTS AND SPECIAL-RANGE PROPERTY

### 1020. General investment powers.

In general<sup>1</sup> a person having trustee investment powers may invest any property<sup>2</sup> in his hands, whether at the time in a state of investment or not, in narrower-range investments<sup>3</sup>, or, subject to certain restrictions<sup>4</sup>, wider-range investments<sup>5</sup>, and may from time to time vary any such investments<sup>6</sup>.

In the exercise of his powers of investment under the Act a person having trustee investment powers must have regard to: (1) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust; and (2) the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description<sup>7</sup>.

1 As to the effect of provisions in enactments or instruments limiting the trustee's powers see PARA 1018 ante.

2 For these purposes, 'property' includes real or personal property of any description, including money and things in action; it does not, however, include any interest in expectancy, but the falling into possession of such an interest, or the receipt of proceeds of its sale, is treated as an accrual of property to the trust fund: Trustee Investments Act 1961 s 4(1). As to things in action see CHOSER IN ACTION vol 13 (2009) PARA 1 et seq. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

3 For these purposes, 'narrower-range investment' means an investment falling within ibid Sch 1 Pt I (paras 1-2) (as amended; repealed with savings: see PARA 1017 ante) or Sch 1 Pt II (paras 1-24) (as amended; repealed with savings: see PARA 1017 ante): s 1(4) (s 1 repealed with savings: see PARA 1017 ante). As to narrower-range investments see PARAS 1021-1023 post.

4 See ibid s 2 (repealed with savings: see PARA 1017 ante); and PARA 1025 post.

5 For these purposes, 'wider-range investment' means an investment falling within ibid Sch 1 Pt III (paras 1-6) (as amended; repealed with savings: see PARA 1017 ante): s 1(4) (repealed with savings: see PARA 1017 ante). As to wider-range investments see PARAS 1024-1025 post.

6 Ibid s 1(1) (repealed with savings: see PARA 1017 ante). Her Majesty may by Order in Council extend the powers of investment conferred by s 1 (repealed), by adding to Sch 1 Pt I (as amended; repealed with savings: see PARA 1017 ante), Sch 1 Pt II (as amended; repealed with savings: see PARA 1017 ante) or Sch 1 Pt III (as amended; repealed with savings: see PARA 1017 ante), any manner of investment specified in the order: s 12(1) (s 12 repealed with savings: see PARA 1017 ante). Any order so made is subject to annulment in pursuance of a resolution of either House of Parliament: s 12(2) (repealed with savings: see PARA 1017 ante). As to the orders made under s 12 (repealed with savings) which are currently in force see the notes to para 1022 et seq post. A person exercising the powers of investment may not invest in any securities where the holder can be required to accept repayment of the principal, or the payment of any interest, otherwise than in sterling, in the currency of a relevant state or in the euro unit: see s 1(2), Sch 1 Pt IV para 1 (amended by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (2); repealed with savings: see PARA 1017 ante). For these purposes, 'securities' includes shares, debentures, units within the Trustee Investments Act 1961 Sch 1 Pt III para 3 (as substituted; repealed with savings: see PARA 1017 ante) or Sch 1 Pt III para 6 (as added; repealed with savings: see PARA 1017 ante) (see PARA 1024 post), Treasury bills and tax reserve certificates: Sch 1 Pt IV para 4 (definition amended by the Financial Services Act 1986 s 212(2), Sch 16 para 2(d); and the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (6)(b); repealed with

savings: see PARA 1017 ante). 'Relevant state' means Austria, Finland, Iceland, Liechtenstein, Norway, Sweden or a member state other than the United Kingdom: Trustee Investments Act 1961 Sch 1 Pt IV para 4 (definition added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (6)(a)); and amended by the Trustee Investments (Additional Powers) Order 1995, SI 1995/768, art 2; repealed with savings: see PARA 1017 ante).

7 Trustee Investments Act 1961 s 6(1) (s 6 repealed with savings: see PARA 1017 ante). A person exercising the powers of investment must use his discretion: see the Trustee Act 1925 s 3 (repealed); the Trustee Investments Act 1961 s 16(1), Sch 4 para 1(1) (repealed); and PARAS 1018 ante, 1031 post. He must use ordinary prudence in the exercise of his investment powers: *Leary v Whiteley* (1887) 12 App Cas 727, HL; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; and see *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA. See also *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750 (duty of pension fund trustees). As to the necessity to take advice in certain cases as to the matters mentioned in the text before an investment is made see PARA 1027 post.

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### **1021. Narrower-range investments authorised by statute.**

The narrower-range investments authorised by the Trustee Investments Act 1961 are divided into two groups:

- 216 (1) narrower-range investments in which a person having trustee investment powers may invest without being required to take advice as to whether the investment is satisfactory<sup>1</sup>;
- 217 (2) narrower-range investments in which a person having trustee investment powers may not invest without obtaining and considering proper advice on the question whether the investment is satisfactory having regard to certain matters<sup>2</sup>.

<sup>1</sup> See the Trustee Investments Act 1961 s 1(1), (4) (s 1 repealed with savings: see PARA 1017 ante), Sch 1 Pt I (paras 1-2) (as amended; Sch 1 repealed with savings: see PARA 1017 ante); and PARA 1022 post.

<sup>2</sup> See *ibid* s 1(1), (4) (s 1 repealed with savings: see PARA 1017 ante), Sch 1 Pt II (paras 1-24) (as amended; repealed with savings: see PARA 1017 ante); and PARA 1023 post. As to the duty to take advice and the nature of the advice to be taken see PARA 1027 post.

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## **1022. Narrower-range investments not requiring advice.**

The narrower-range investments in which a person having trustee investment powers may invest without being required to take advice are:

- 218 (1) Defence Bonds, National Savings Certificates, Ulster Savings Certificates, Ulster Development Bonds, National Development Bonds, British Savings Bonds, National Savings Income Bonds, National Savings Deposit Bonds, National Savings Indexed-Income Bonds, National Savings Capital Bonds, National Savings FIRST Option Bonds, National Savings Pensioners Guaranteed Income Bonds<sup>1</sup>; and
- 219 (2) deposits in the National Savings Bank<sup>2</sup>.

1 Trustee Investments Act 1961 s 1(1), Sch 1 Pt I para 1 (amended by the Trustee Investments (Additional Powers) (No 2) Order 1962, SI 1962/2611, art 1; the Trustee Investments (Additional Powers) Order 1964, SI 1964/703, art 1; the Trustee Investments (Additional Powers) Order 1968, SI 1968/470, art 1; the Trustee Investments (Additional Powers) Order 1982, SI 1982/1086, art 2; the Trustee Investments (Additional Powers) (No 2) Order 1983, SI 1983/1525, art 2; the Trustee Investments (Additional Powers) Order 1985, SI 1985/1780, art 2; the Trustee Investments (Additional Powers) Order 1988, SI 1988/2254, art 2; the Trustee Investments (Additional Powers) Order 1992, SI 1992/1738, art 2; and the Trustee Investments (Additional Powers) Order 1994, SI 1994/265, art 2; and repealed with savings: see PARA 1017 ante). See further, in relation to eligible debt securities, the Uncertificated Securities (Amendment) (Eligible Debt Securities) Regulations 2003 SI 2003/1633, reg 15 Sch 2 paras 8(1), (2)(a).

2 Trustee Investments Act 1961 Sch 1 Pt I para 2 (amended by the Post Office Act 1969 ss 94, 114, Sch 6 Pt III; and the Trustee Savings Banks Act 1976 s 36(2), Sch 6; and repealed with savings: see PARA 1017 ante).

For the purpose of the provisions of the National Savings Bank Act 1971 limiting the amount of deposits (see s 4(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 814), a person who is a trustee is treated separately in his personal capacity and in his capacity as trustee; and in his capacity as trustee he is treated separately in respect of each separate trust fund: see s 4(3).

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### **1023. Narrower-range investments requiring advice.**

The narrower-range investments in which a person having trustee investment powers may not invest without advice<sup>1</sup> consist of the following classes of securities<sup>2</sup>:

- 220 (1) securities issued by Her Majesty's United Kingdom<sup>3</sup> government, the government of Northern Ireland or the government of the Isle of Man, not being narrower-range investments not requiring advice<sup>4</sup> and being fixed-interest securities<sup>5</sup> registered in the United Kingdom or the Isle of Man, Treasury bills<sup>6</sup> or tax reserve certificates or any variable interest securities issued by Her Majesty's United Kingdom government and registered in the United Kingdom<sup>7</sup>;
  - 221 (2) any securities the payment of interest on which is guaranteed by Her Majesty's United Kingdom government or the government of Northern Ireland<sup>8</sup>;
  - 222 (3) fixed-interest securities issued in the United Kingdom by any public authority or nationalised industry or undertaking in the United Kingdom<sup>9</sup>;
  - 223 (4) fixed-interest securities issued in the United Kingdom by the government of any overseas territory<sup>10</sup> within the Commonwealth or by any public or local authority within such a territory, being securities registered in the United Kingdom<sup>11</sup>;
  - 224 (5) securities issued in the United Kingdom by the government of an overseas territory within the Commonwealth or by any public or local authority within such a territory, being securities registered in the United Kingdom and in respect of which the rate of interest is variable by reference to one or more of certain specified rates<sup>12</sup>;
  - 225 (6) fixed-interest securities issued in the United Kingdom by:
- 13
- 19. (a) the African Development Bank, the Asian Development Bank, the Caribbean Development Bank, the European Bank for Reconstruction and Development<sup>13</sup>, the International Finance Corporation<sup>14</sup>, the International Monetary Fund<sup>15</sup> or the International Bank for Reconstruction and Development<sup>16</sup>, being securities registered in the United Kingdom<sup>17</sup>; or
  - 20. (b) the Inter-American Development Bank<sup>18</sup>; or
  - 21. (c) the European Atomic Energy Community, the European Economic Community, the European Investment Bank or the European Coal and Steel Community, being securities registered in the United Kingdom<sup>19</sup>;
- 14
- 226 (7) securities issued in the United Kingdom by:
- 15
- 22. (a) the International Bank for Reconstruction and Development or the European Investment Bank or the European Coal and Steel Community, being securities registered in the United Kingdom; or
  - 23. (b) the Inter-American Development Bank,
- 16
- 227 being securities of which the rate of interest is variable by reference to one or more of certain specified rates<sup>20</sup>;

- 228 (8) securities issued in the United Kingdom by the African Development Bank, the Asian Development Bank, the Caribbean Development Bank, the European Atomic Energy Community, the European Bank for Reconstruction and Development, the European Economic Community, the International Finance Corporation or the International Monetary Fund, being securities registered in the United Kingdom and in respect of which the rate of interest is variable by reference to one or more of certain specified rates<sup>21</sup>;
- 229 (9) debentures<sup>22</sup> issued in the United Kingdom by a company incorporated<sup>23</sup> in the United Kingdom, being debentures registered in the United Kingdom<sup>24</sup>;
- 230 (10) stock of the Bank of Ireland and Bank of Ireland 7 per cent Loan Stock 1968/91<sup>25</sup>;
- 231 (11) loans to any local authority in the United Kingdom<sup>26</sup> and certain other specified authorities<sup>27</sup> charged on all or any of the revenues of the authority or on a fund into which all or any of those revenues are payable, any fixed-interest securities issued in the United Kingdom by any such authority for the purpose of borrowing money so charged, and deposits with any such authority by way of temporary loan made on the giving of a receipt for the loan by the treasurer or other similar officer of the authority and on the giving of an undertaking by the authority that, if requested so to charge the loan, it will either comply with the request or repay the loan<sup>28</sup>;
- 232 (12) securities issued in the United Kingdom by any authority to which head (11) above applies for the purpose of borrowing money charged on all or any of the revenues of the authority or on a fund into which all or any of those revenues are payable and being securities in respect of which the rate of interest is variable by reference to one or more of certain rates<sup>29</sup>;
- 233 (13) any units of a gilt unit trust scheme<sup>30</sup>;
- 234 (14) deposits with a building society<sup>31</sup>;
- 235 (15) mortgages of freehold property in England and Wales or Northern Ireland and of leasehold property in those countries<sup>32</sup> of which the unexpired term at the time of investment is not less than 60 years, and loans on heritable security in Scotland<sup>33</sup>;
- 236 (16) perpetual rentcharges charged on land in England and Wales or Northern Ireland and fee-farm rents (not being rentcharges) issuing out of the land<sup>34</sup>;
- 237 (17) certificates of tax deposit<sup>35</sup>;
- 238 (18) fixed-interest or variable interest securities issued by the government of a relevant state<sup>36</sup>;
- 239 (19) any securities the payment of interest on which is guaranteed by the government of a relevant state<sup>37</sup>;
- 240 (20) fixed-interest securities issued in any relevant state by any public authority or nationalised industry or undertaking in that state<sup>38</sup>;
- 241 (21) fixed-interest or variable interest securities issued in a relevant state by the government of any overseas territory<sup>39</sup> within the Commonwealth or by any public or local authority within such a territory<sup>40</sup>;
- 242 (22) fixed-interest or variable interest securities issued in a relevant state by the African Development Bank, the Asian Development Bank, the Caribbean Development Bank, the International Finance Corporation, the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the European Atomic Energy Community, the European Bank for Reconstruction and Development, the European Economic Community, the European Investment Bank or the European Coal and Steel Community<sup>41</sup>;
- 243 (23) debentures issued in any relevant state by a company incorporated in that state<sup>42</sup>;
- 244 (24) loans to any specified authority<sup>43</sup> secured on all or any of the revenues of the authority or on a fund into which all or any of those revenues are payable,

fixed-interest or variable interest securities issued in a relevant state by any such authority in that state for the purpose of borrowing money so secured, and deposits with any specified authority<sup>44</sup> by way of temporary loan made on the giving of a receipt for the loan by the treasurer or other similar officer of the authority and on the giving of an undertaking by the authority that, if requested so to charge the loan, it will either comply with the request or repay the loan<sup>45</sup>;

245 (25) deposits with a mutual investment society<sup>46</sup> whose head office is located in a relevant state<sup>47</sup>;

246 (26) loans secured on any interest in property in a relevant state which corresponds to an interest in property falling within head (15) above<sup>48</sup>.

1 See PARA 1020 ante. The narrower-range investments requiring advice formerly included debentures or the guaranteed or preference stock of any incorporated company, being statutory water undertakers within the meaning of the Water Act 1945, or any corresponding enactment in force in Northern Ireland, and having during each of the ten years immediately preceding the calendar year in which the investment was made paid a dividend of not less than 5% on its ordinary shares: see the Trustee Investments Act 1961 s 1(1), Sch 1 Pt II para 10 (repealed). Schedule 1 Pt II para 10 ceased to have effect, except in so far as it relates to the debentures or guaranteed or preference stock of a company which is a statutory water undertaker within the meaning of an enactment in force in Northern Ireland, as from 1 September 1989; and any property which immediately before that date was, by virtue of that provision, comprised in a particular part of any fund is not required to be treated, for the purposes of the Trustee Investments Act 1961 or for any other purpose, as comprised in a different part of that fund: see the Water Act 1989 s 190(1), Sch 25 para 29(2), (3). As to statutory water undertakers see WATER AND WATERWAYS vol 100 (2009) PARA 108 et seq. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

2 See ibid Sch 1 Pt II (paras 1-24) (as amended; repealed with savings: see PARA 1017 ante). The securities mentioned in Sch 1 Pt II paras 1-7 (as amended; repealed with savings: see PARA 1017 ante) (see heads (1)-(10) in the text), other than Treasury bills or tax reserve certificates, securities issued before 3 August 1961 by the Isle of Man government, securities falling within Sch 1 Pt II para 4 (repealed with savings: see PARA 1017 ante) (see head (4) in the text) issued before that date or securities falling within Sch 1 Pt II para 9 (repealed with savings: see PARA 1017 ante) (see head (11) in the text), and the securities mentioned in Sch 1 Pt III para 1 (repealed with savings: see PARA 1017 ante) (see PARA 1024 post), do not include: (1) securities the price of which is not quoted on a recognised investment exchange within the meaning of the Financial Services and Markets Act 2000 s 285 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 684) or on an investment exchange which constitutes the principal or only market established in a relevant state on which securities admitted to official listing are dealt in or traded; or (2) shares or debenture stock not fully paid up, except shares or debenture stock which by the terms of issue are required to be fully paid up within nine months of the date of issue: Trustee Investments Act 1961 s 1(2), Sch 1 Pt IV para 2 (amended by the Financial Services Act 1986 s 212(2), Sch 16 para 2(c); and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 269(1)(5); repealed with savings: see PARA 1017 ante). For other limits on the types of securities permitted see the Trustee Investments Act 1961 Sch 1 Pt IV para 1 (as amended; repealed with savings: see PARA 1017 ante), Sch 1 Pt IV para 2A (as added; repealed with savings: see PARA 1017 ante), Sch 1 Pt IV para 3 (as amended; repealed with savings: see PARA 1017 ante); note 24 infra; and PARA 1020 note 6 ante. For the meaning of 'relevant state' see PARA 1020 note 6 ante; and for the general meaning of 'securities' see PARA 1020 note 6 ante.

3 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

4 Ie not being securities falling within the Trustee Investments Act 1961 Sch 1 Pt I (paras 1-2) (as amended; repealed with savings: see PARA 1017 ante): see PARA 1022 ante.

5 For these purposes, 'fixed-interest securities' means securities which under their terms of issue bear a fixed rate of interest: ibid Sch 1 Pt IV para 4 (repealed with savings: see PARA 1017 ante).

6 For these purposes, 'Treasury bills' includes bills issued by Her Majesty's United Kingdom government and Northern Ireland Treasury bills: ibid Sch 1 Pt IV para 4 (definition amended by the National Loans Act 1968 s 24(2), Sch 6 Pt I; repealed with savings: see PARA 1017 ante).

7 Trustee Investments Act 1961 Sch 1 Pt II para 1 (amended by the Trustee Investments (Additional Powers) Order 1977, SI 1977/831, art 3; repealed with savings: see PARA 1017 ante). Tax reserve certificates have been replaced by certificates of tax deposit: see INCOME TAXATION; and cf head (17) in the text. As to the government of Northern Ireland see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 67 et seq. As to government securities and their registration see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1335 et seq.

8 Trustee Investments Act 1961 Sch 1 Pt II para 2 (repealed with savings: see PARA 1017 ante).



9 Ibid Sch 1 Pt II para 3 (repealed with savings: see PARA 1017 ante).

10 For these purposes, references to an overseas territory or to the government of such a territory are to be construed as if they occurred in the Overseas Development and Co-operation Act 1980: see the Trustee Investments Act 1961 Sch 1 Pt II para 4 (repealed with savings: see PARA 1017 ante); and the Interpretation Act 1978 s 17(2)(a).

11 Trustee Investments Act 1961 Sch 1 Pt II para 4 (repealed with savings: see PARA 1017 ante).

12 Ibid Sch 1 Pt II para 4A (added by the Trustee Investments (Additional Powers) (No 2) Order 1977, SI 1977/1878, art 3; repealed with savings: see PARA 1017 ante). The rates so specified are: (1) the Bank of England's minimum lending rate; (2) the average rate of discount on allotment on 91-day Treasury bills; (3) a yield on 91-day Treasury bills; (4) a London sterling inter-bank offered rate; (5) a London sterling certificate of deposit rate: see the Trustee Investments Act 1961 Sch 1 Pt II para 4A (as so added and repealed with savings).

13 As to the European Bank for Reconstruction and Development see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1393.

14 As to the International Finance Corporation see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1391.

15 As to the International Monetary Fund see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1391.

16 As to the International Bank for Reconstruction and Development see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1391.

17 Trustee Investments Act 1961 Sch 1 Pt II para 5 (amended by the Trustee Investments (Additional Powers) Order 1983, SI 1983/772, art 2(a); and the Trustee Investments (Additional Powers) Order 1991, SI 1991/999, art 2; repealed with savings: see PARA 1017 ante). As to international development banks see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1391.

18 Trustee Investments Act 1961 Sch 1 Pt II para 5 (amended by the Trustee Investments (Additional Powers) (No 2) Order 1964, SI 1964/1404, art 1; repealed with savings: see PARA 1017 ante).

19 Trustee Investments Act 1961 Sch 1 Pt II para 5 (amended by the Trustee Investments (Additional Powers) Order 1972, SI 1972/1818, art 3; and the Trustee Investments (Additional Powers) Order 1983, SI 1983/772, art 2(b); repealed with savings: see PARA 1017 ante).

20 Trustee Investments Act 1961 Sch 1 Pt II para 5A (added by the Trustee Investments (Additional Powers) (No 2) Order 1977, SI 1977/1878, art 3; repealed with savings: see PARA 1017 ante). The rates specified are identical to those referred to in note 12 heads (1)-(5) supra.

21 Trustee Investments Act 1961 Sch 1 Pt II para 5B (added by the Trustee Investments (Additional Powers) Order 1983, SI 1983/772, art 2(c); and amended by the Trustee Investments (Additional Powers) Order 1991, SI 1991/999, art 2; repealed with savings: see PARA 1017 ante). The rates specified are identical to those referred to in note 12 heads (2)-(5) supra.

22 For these purposes, 'debenture' includes debenture stock and bonds, whether constituting a charge on assets or not, and loan stock or notes: Trustee Investments Act 1961 Sch 1 Pt IV para 4 (repealed with savings: see PARA 1017 ante). It does not include debenture stock not fully paid up and not required to be fully paid up within nine months of issue: see note 2 supra.

23 For these purposes, references to an incorporated company, in relation to the United Kingdom, are references to a company incorporated by or under any enactment and include references to a body of persons established for the purpose of trading for profit and incorporated by royal charter: ibid Sch 1 Pt IV para 6 (amended by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (7); repealed with savings: see PARA 1017 ante).

24 Trustee Investments Act 1961 Sch 1 Pt II para 6 (repealed with savings: see PARA 1017 ante). The securities mentioned in Sch 1 Pt II paras 6, 21 (as added; repealed with savings: see PARA 1017 ante) (see the text and note 42 infra) and Sch 1 Pt III paras 1, 4 (as added; repealed with savings: see PARA 1017 ante) (see PARA 1024 post) do not include: (1) shares or debentures of an incorporated company of which the total issued and paid up share capital is less than £1 million; (2) shares or debentures of an incorporated company of which the total issued and paid up share capital at any time on the business day before the investment is made is less than the equivalent of £1 million in the currency of a relevant state (at the exchange rate prevailing in the United Kingdom at the close of business on the day before the investment is made); (3) shares or debentures of an incorporated company which has not in each of the five years immediately preceding the calendar year in which the investment is made paid a dividend on all the shares issued by the company, excluding any shares

issued after the dividend was declared and any shares which by their terms of issue did not rank for the dividend for that year: Sch 1 Pt IV para 3 (amended by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (5); repealed with savings: see PARA 1017 ante). For the purposes of head (3) supra, a company formed to take over the business of another company or other companies or to acquire the securities of, or control of, another company or other companies, or for either of those purposes and for other purposes is deemed to have paid a dividend in any year in which such a dividend has been paid by the other company or all the other companies, as the case may be: Trustee Investments Act 1961 Sch 1 Pt IV para 3 (as so amended; repealed with savings: see PARA 1017 ante). See also the Electricity (Northern Ireland Consequential Amendments) Order 1992, SI 1992/232, art 4.

25 Trustee Investments Act 1961 Sch 1 Pt II para 7 (amended by the Trustee Investments (Additional Powers) Order 1966, SI 1966/401, art 1; repealed with savings: see PARA 1017 ante).

26 For these purposes, 'local authority', in relation to the United Kingdom, means any of the following authorities: (1) in England and Wales, the council of a county, a county borough, a borough, an urban or rural district or a parish, the Common Council of the City of London, the Greater London Council and the Council of the Isles of Scilly; (2) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973: Trustee Investments Act 1961 Sch 1 Pt IV para 4 (definition amended by the London Government Act 1963 ss 1(6), 83(1), 93(1), Sch 17 para 25, Sch 18 Pt II; the Local Government Act 1972 ss 1(10), 179(3), (4), 272(1), Sch 30; the Statute Law (Repeals) Act 1981; and the Local Government (Wales) Act 1994 s 66(6), Sch 16 para 19(2); repealed with savings: see PARA 1017 ante). The Greater London Council was abolished as from 1 April 1986 by the Local Government Act 1985 s 1(1)(a), (2) and its functions were transferred mainly to the London borough councils and the Common Council of the City of London by Pt II (ss 2-17) (as amended). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to local government in London, including the Greater London Authority and the London Assembly, see LONDON GOVERNMENT.

27 The specified authorities are:

- 5 (1) the Greater London Authority (Trustee Investments Act 1961 Sch 1 Pt II para 9(aa) (added by the Greater London Authority Act 1999 s 387(1), (3)(a); repealed with savings: see PARA 1017 ante));
- 6 (2) any functional body within the meaning of the Greater London Authority Act 1999 (see LONDON GOVERNMENT) (Trustee Investments Act 1961 Sch 1 Pt II para 9(ab) (added by the Greater London Authority Act 1999 s 387(1), (3)(a); repealed with savings: see PARA 1017 ante));
- 7 (3) any authority all the members of which are appointed or elected by one or more local authorities in the United Kingdom (Trustee Investments Act 1961 Sch 1 Pt II para 9(b) (repealed with savings: see PARA 1017 ante));
- 8 (4) any authority the majority of the members of which are appointed or elected by one or more local authorities in the United Kingdom, being an authority which by virtue of any enactment has power to issue a precept to a local authority in England and Wales, or a requisition to a local authority in Scotland, or to the expenses of which, by virtue of any enactment, a local authority in the United Kingdom is or can be required to contribute (Sch 1 Pt II para 9(c) (repealed with savings: see PARA 1017 ante));
- 9 (5) a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139) (Trustee Investments Act 1961 Sch 1 Pt II para 9(d) (amended by the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 47; the Police Act 1996 s 103, Sch 7 para 1(1), (2)(a); and the Greater London Authority Act 1999 ss 387(1), (3)(b), 423, Sch 34 Pt I; repealed with savings: see PARA 1017 ante));
- 10 (6) the Belfast City and District Water Commissioners (Trustee Investments Act 1961 Sch 1 Pt II para 9(e) (repealed with savings: see PARA 1017 ante));
- 11 (7) the former Great Ouse Water Authority (Sch 1 Pt II para 9(f) (added by the Trustee Investments (Additional Powers) Order 1962, SI 1962/658, art 1; repealed with savings: see PARA 1017 ante));
- 12 (8) any district council in Northern Ireland (Trustee Investments Act 1961 Sch 1 Pt II para 9(g) (added by the Trustee Investments (Additional Powers) Order 1973, SI 1973/1332, art 3; repealed with savings: see PARA 1017 ante));
- 13 (9) any residuary body established by the Local Government Act 1985 s 57 (see LOCAL GOVERNMENT vol 69 (2009) PARA 17) (Trustee Investments Act 1961 Sch 1 Pt II para 9(i) (added by

the Trustee Investments (Additional Powers) Order 1986, SI 1986/601, art 2; repealed with savings: see PARA 1017 ante)).

28 Trustee Investments Act 1961 Sch 1 Pt II para 9 (repealed with savings: see PARA 1017 ante).

29 Ibid Sch 1 Pt II para 9A (added by the Trustee Investments (Additional Powers) (No 2) Order 1977, SI 1977/1878, art 3; repealed with savings: see PARA 1017 ante). The rates specified are identical to those referred to in note 12 heads (1)-(5) supra.

30 Trustee Investments Act 1961 Sch 1 Pt II para 10A (added by the Finance Act 1982 s 150; and substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 269(1), (2); repealed with savings: see PARA 1017 ante). For these purposes, references to a gilt unit trust scheme are references to an authorised unit trust scheme or a recognised scheme, the objective of which is: (1) to invest at least 90% of the property of the scheme in loan stock, bonds or other instruments creating indebtedness which are transferable, and are issued or guaranteed by the government of the United Kingdom or of any other country or territory, by a local authority in the United Kingdom or in a relevant state, or by an international organisation the members of which include the United Kingdom or a relevant state; (2) to invest the remainder of the property of the scheme in shares, debentures or other instruments creating or acknowledging indebtedness, certificates representing securities or units in a collective investment scheme: Trustee Investments Act 1961 Sch 1 Pt II para 10A (as so added, substituted and repealed with savings). For these purposes 'authorised unit trust scheme' and 'recognised scheme' have the meanings given by the Financial Services and Markets Act 2000 s 237(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603): Trustee Investments Act 1961 Sch 1 Pt IV para 4A (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 269(1), (6); repealed with savings: see PARA 1017 ante).

31 Trustee Investments Act 1961 Sch 1 Pt II para 12 (substituted by the Building Societies Act 1986 s 120(1), Sch 18 Pt I para 4(2); repealed with savings: see PARA 1017 ante). For these purposes, 'building society' means a building society within the meaning of the Building Societies Act 1986 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856): see the Trustee Investments Act 1961 Sch 1 Pt II para 12 (as so substituted; repealed with savings: see PARA 1017 ante).

32 'Mortgage', in relation to freehold or leasehold property in Northern Ireland, includes a registered charge which, by virtue of the Local Registration of Title (Ireland) Act 1891 s 40(4) (repealed), or any other enactment, operates as a mortgage by deed: Trustee Investments Act 1961 Sch 1 Pt IV para 5 (repealed with savings: see PARA 1017 ante).

33 Ibid Sch 1 Pt II para 13 (repealed with savings: see PARA 1017 ante).

34 Ibid Sch 1 Pt II para 14 (repealed with savings: see PARA 1017 ante). As to rentcharges see RENTCHARGES AND ANNUITIES. Transitional provisions in the Trustee Act 2000 provide that a trustee is not to be liable for breach of trust merely because he continues to hold an investment by virtue of the Trustee Investments Act 1961 Sch 1 Pt II para 14 (Trustee Act 2000 s 40(2), Sch 3 para 7(1)); and that a person who: (1) is not a trustee; (2) before the commencement of the Trustee Act 2000 Pt II (ss 3-7) had powers to invest in the investments described in the Trustee Investments Act 1961 Sch 1 Pt II para 14; and (3) on that commencement acquired the general power of investment, is not to be treated as exceeding his powers of investment merely because he continues to hold an investment acquired by virtue of Sch 1 Pt II para 14 (Trustee Act 2000 Sch 3 para 7(2)). For the meaning of 'the general power of investment' see PARA 1012 post. As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

35 Trustee Investments Act 1961 Sch 1 Pt II para 15 (added by the Trustee Investments (Additional Powers) Order 1975, SI 1975/1710, art 3; repealed with savings: see PARA 1017 ante). As to certificates of tax deposit see note 7 supra.

36 Trustee Investments Act 1961 Sch 1 Pt II para 16 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante). The securities mentioned in the Trustee Investments Act 1961 Sch 1 Pt II paras 16-21 (as added), other than securities traded on a relevant money market or securities falling within Sch 1 Pt II para 22 (as added) (see the text and notes 43-45 infra), and the securities falling within Sch 1 Pt III para 4 (as added) (see PARA 1024 post) do not include: (1) securities the price for which is not quoted on a recognised investment exchange within the meaning of the Financial Services and Markets Act 2000 s 285 or on an investment exchange which constitutes the principal or only market established in a relevant state on which securities admitted to official listing are dealt in or traded; (2) shares or debenture stock not fully paid up (except shares or debenture stock which by the terms of issue are required to be fully paid up within nine months of the date of issue or shares issued with no nominal value): Sch 1 Pt IV para 2A (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (4); amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 269(1), (5); repealed with savings: see PARA 1017 ante). For these purposes, 'relevant money market' means a money market which is supervised by the central bank, or a government

agency, of a relevant state: Trustee Investments Act 1961 Sch 1 Pt IV para 4 (definition added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (6)(a); repealed with savings: see PARA 1017 ante).

37 Trustee Investments Act 1961 Sch 1 Pt II para 17 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante). See also note 36 supra.

38 Trustee Investments Act 1961 Sch 1 Pt II para 18 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante). See also note 36 supra.

39 For this purpose, 'overseas territory' means any territory or country outside the United Kingdom, and the reference to the government of any overseas territory includes a reference to a government constituted for two or more overseas territories, and to any authority established for the purpose of providing or administering services which are common to, or relate to matters of common interest to, two or more such territories: Trustee Investments Act 1961 Sch 1 Pt II para 19 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); amended by the International Development Act 2002 s 19(1), Sch 3 para 1; repealed with savings: see PARA 1017 ante).

40 Trustee Investments Act 1961 Sch 1 Pt II para 19 (as added (see note 39 supra); repealed with savings: see PARA 1017 ante). See also note 36 supra.

41 Trustee Investments Act 1961 Sch 1 Pt II para 20 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante). See also note 36 supra.

42 Trustee Investments Act 1961 Sch 1 Pt II para 21 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante). See also notes 24, 36 supra.

43 In any local authority in a relevant state or any authority all the members of which are appointed or elected by one or more local authorities in any such state: see the Trustee Investments Act 1961 Sch 1 Pt II para 22 (as added and repealed with savings: see note 45 infra).

44 See note 43 supra.

45 Trustee Investments Act 1961 Sch 1 Pt II para 22 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante).

46 For these purposes, 'mutual investment society' means a credit institution which operates on mutual principles and which is authorised by the appropriate supervisory authority of a relevant state: Trustee Investments Act 1961 Sch 1 Pt IV para 4 (definition added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 3(1), (6)(a); repealed with savings: see PARA 1017 ante).

47 Trustee Investments Act 1961 Sch 1 Pt II para 23 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante).

48 Trustee Investments Act 1961 Sch 1 Pt II para 24 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(2); repealed with savings: see PARA 1017 ante).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(iii) Power to Invest/C. STATUTORY POWERS OF INVESTMENT UNDER THE TRUSTEE INVESTMENTS ACT 1961/(C) Narrower-range and Wider-range Investments and Special-range Property/1024. Wider-range investments authorised by statute.

## **1024. Wider-range investments authorised by statute.**

The authorised wider-range investments<sup>1</sup> are:

- 247 (1) any securities<sup>2</sup> issued in the United Kingdom<sup>3</sup> by a company incorporated<sup>4</sup> in the United Kingdom, being securities registered in the United Kingdom and not being securities falling within the classes of narrower-range investments<sup>5</sup> requiring advice<sup>6</sup>;
- 248 (2) shares in a building society<sup>7</sup>;
- 249 (3) any units of an authorised unit trust scheme<sup>8</sup>;
- 250 (4) any securities<sup>9</sup> issued in any relevant state<sup>10</sup> by a company incorporated in that state or by an unincorporated body constituted under the law of that state, not being (in either case) securities falling within the classes of narrower-range investments requiring advice or securities which fall within head (6) below<sup>11</sup>;
- 251 (5) shares in a mutual investment society<sup>12</sup> whose head office is located in a relevant state<sup>13</sup>;
- 252 (6) units of a recognised investment scheme<sup>14</sup> which does not fall within the classes of narrower-range investments requiring advice<sup>15</sup>;
- 253 (7) any shares in an open-ended investment company<sup>16</sup>.

1 See the Trustee Investments Act 1961 s 1(1), Sch 1 Pt III (paras 1-6) (as amended and repealed with savings). As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante. As to the restrictions on wider-range investment see PARA 1025 post; and as to the duty to obtain advice see PARA 1027 post.

2 As to the securities which are not included see the Trustee Investments Act 1961 s 1(2), Sch 1 Pt IV para 2 (as amended; repealed with savings: see PARA 1017 ante) (see PARA 1023 note 2 ante) and Sch 1 Pt IV para 3 (as amended; repealed with savings: see PARA 1017 ante) (see PARA 1023 note 24 ante).

3 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

4 For the meaning of 'incorporated company' see PARA 1023 note 23 ante.

5 Ie not being securities falling within the Trustee Investments Act 1961 s 1(1) (repealed with savings: see PARA 1017 ante), Sch 1 Pt II (paras 1-24) (as amended; repealed with savings: see PARA 1017 ante): see PARA 1023 ante.

6 Ibid Sch 1 Pt III para 1 (repealed with savings: see PARA 1017 ante).

7 Ibid Sch 1 Pt III para 2 (substituted by the Building Societies Act 1986 s 120(1), Sch 18 Pt I para 4(3); repealed with savings: see PARA 1017 ante). For these purposes, 'building society' means a building society within the meaning of the Building Societies Act 1986 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856): see the Trustee Investments Act 1961 Sch 1 Pt III para 2 (as so substituted and repealed with savings).

8 Ibid Sch 1 Pt III para 3 (substituted by the Financial Services Act 1986 s 212(2), Sch 16 para 2(b); repealed with savings: see PARA 1017 ante). An authorised unit trust scheme is one within the meaning of the Financial Services and Markets Act 2000 s 237(3) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603): Trustee Investments Act 1961 Sch 1 Pt III para 3 (as so substituted; repealed with savings: see PARA 1017 ante), Sch 1 Pt IV para 4A (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Appeals) Order 2001, SI 2001/3649, art 269 (1), (3)).

9 See note 2 *supra*.

10 For the meaning of 'relevant state' see PARA 1020 note 6 *ante*.

11 Trustee Investments Act 1961 Sch 1 Pt III para 4 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(3); repealed with savings: see PARA 1017 *ante*).

12 For the meaning of 'mutual investment society' see PARA 1023 note 46 *ante*.

13 Trustee Investments Act 1961 Sch 1 Pt III para 5 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(3); repealed with savings: see PARA 1017 *ante*).

14 Is within the meaning of the Financial Services and Markets Act 2000 s 237(3): see note 8 *supra*; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603.

15 Trustee Investments Act 1961 Sch 1 Pt III para 6 (added by the Trustee Investments (Additional Powers) (No 2) Order 1994, SI 1994/1908, art 2(3); substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Appeals) Order 2001, SI 2001/3649, art 269 (1), (4); repealed with savings: see PARA 1017 *ante*).

16 Trustee Investments Act 1961 Sch 1 Pt III para 2A (added by the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 75, Sch 8 para 1; substituted by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 84, Sch 7 Pt 1 para 1; repealed with savings: see PARA 1017 *ante*). The reference in the text is to a company within the meaning of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 623).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(iii) Power to Invest/C. STATUTORY POWERS OF INVESTMENT UNDER THE TRUSTEE INVESTMENTS ACT 1961/(C) Narrower-range and Wider-range Investments and Special-range Property/1025. Restrictions on wider-range investment.

## **1025. Restrictions on wider-range investment.**

A person having trustee investment powers has no power<sup>1</sup> to make or retain any wider-range investment<sup>2</sup> unless the fund<sup>3</sup> has been divided into two parts ('the narrower-range part' and 'the wider-range part'). The division must normally<sup>4</sup> be made so that the value<sup>5</sup> of the wider-range part at the time of the division bears to the then value of the narrower-range part the proportion of three to one<sup>6</sup>. Where such a division has been made, no subsequent division of the same fund is, with one exception<sup>7</sup>, to be made, and no property is to be transferred from one part of the fund to the other unless either the transfer is authorised or required by the statutory provisions relating to trustee investment<sup>8</sup> or a compensating transfer<sup>9</sup> is made at the same time<sup>10</sup>.

Property belonging to the narrower-range part of a fund may not<sup>11</sup> be invested except in narrower-range investments<sup>12</sup>, and any property invested in any other manner which is or becomes comprised in that part of the fund must either be transferred to the wider-range part of the fund with a compensating transfer or be reinvested in narrower-range investments as soon as may be<sup>13</sup>.

Where any property accrues to a fund after the fund has been divided<sup>14</sup>, then, if the property accrues to the person having trustee investment powers as owner or former owner of property comprised in either part of the fund, it is to be treated as belonging to that part of the fund<sup>15</sup> and, in any other case, the person having trustee investment powers must secure, by apportionment of the accruing property or the transfer of property from one part of the fund to the other, or both, that the value of each part of the fund is increased by the same<sup>16</sup> amount<sup>17</sup>.

Where, in the exercise of any power or duty of a person having trustee investment powers, property falls to be taken out of the fund, nothing in these provisions<sup>18</sup> restricts his discretion as to the choice of property to be taken out<sup>19</sup>.

1    le under the Trustee Investments Act 1961 s 1 (repealed with savings: see PARA 1017 ante): see PARA 1020 ante. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

2    For the meaning of 'wider-range investments' see PARA 1020 note 5 ante. As to wider-range investments see PARA 1024 ante.

3    For this purpose, so much of the property in the hands of a person having trustee investment powers constitutes one fund as is held on trusts which, as respects the beneficial owners or their respective interests or the purposes for which the fund is held or as respects the powers of the person having trustee investment powers, are not identical with those on which any other property in his hands is held: Trustee Investments Act 1961 s 4(2). As to the exclusion of special-range property from the fund for this purpose see PARA 1026 post.

4    For the special provision as to a fund formed by appropriation out of another fund see note 10 infra.

5    If a person having trustee investment powers obtains a valuation in writing of any property from a person reasonably believed by the person having trustee investment powers to be qualified to make it, the valuation is conclusive in determining whether the division of the fund or any transfer or apportionment of property has been duly made (Trustee Investments Act 1961 s 5(1) (repealed with savings: see PARA 1017 ante)), notwithstanding that it is made by a person in the course of his employment as an officer or servant (s 5(2) (repealed: see supra)).

6 Trustee Investments (Division of Trust Fund) Order 1996, SI 1996/845. This alters the original rule which required equal division. The order was made under the Trustee Investments Act 1961 s 13(1) (repealed with savings: see PARA 1017 ante), which provides that the Treasury may by order made by statutory instrument direct that, subject to the Trustee Investments Act 1961 s 4(3) (see note 10 infra), any division of a fund is to be made so that the value of the wider-range part at the time of the division bears to the then value of the narrower-range part such proportion greater than one but not greater than three to one, as may be prescribed by the order, the proportion for the time being prescribed being known as 'the prescribed proportion'. Notwithstanding anything contained in s 2(1) (repealed with savings: see PARA 1017 ante), a fund which has been already divided before the coming into operation of such an order may be again divided (once only) during the continuance in force of the order: s 13(2) (repealed with savings: see PARA 1017 ante). Such an order may be revoked by a subsequent order prescribing a greater proportion: s 13(4) (repealed with savings: see PARA 1017 ante). No order made under these provisions has effect unless approved by a resolution of each House of Parliament: s 13(5) (repealed with savings: see PARA 1017 ante). As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 512-517.

7 There is power to make a further division where the Treasury makes an order under *ibid* s 13 (repealed with savings: see PARA 1017 ante): see note 6 supra.

8 See *ibid* ss 2(2), (3), 3(3), Sch 2 para 3 (repealed with savings: see PARA 1017 ante).

9 For these purposes, 'compensating transfer', in relation to any transferred property, means a transfer in the opposite direction of property of equal value: *ibid* s 2(1) (prospectively repealed: see note 10 infra).

10 *Ibid* s 2(1) (repealed with savings: see PARA 1017 ante). Where property is taken out of a trust fund by way of appropriation so as to form a separate fund and at the time of the appropriation the trust fund had, as to the whole or a part of it, been divided in pursuance of s 2(1) (repealed with savings: see PARA 1017 ante) or s 2(1) as modified by s 3(3), Sch 2 (repealed with savings: see PARA 1017 ante), then, if the separate fund is so divided, the narrower-range and wider-range parts of the separate fund may be constituted so as either to be equal, or to bear to each other the same proportion as the two corresponding parts of the fund out of which it was so appropriated (the values of those parts of those funds being ascertained as at the time of appropriation), or some intermediate proportion: s 4(3). Where special-range property has been carried to a separate part of the trust fund (see PARA 1026 post) and it is then converted into property other than special-range property, the property into which it is converted must be transferred to the narrower-range part of the fund or the wider-range part of the fund or apportioned between them, and any transfer of property from one of those parts to the other which is necessary to secure that the value of each of those parts of the fund is increased by the same amount must be made: Sch 2 para 3 (repealed with savings: see PARA 1017 ante). On the coming into operation of any Treasury order modifying the provisions as to the division of funds (see note 6 supra), the above provisions relating to separate funds formed by appropriation and to the effect of the conversion of special-range property are modified to the extent that: (1) the narrower-range and wider-range parts of such a separate fund will have to be constituted so as to bear to each other either the prescribed proportion (see note 6 supra) or the same proportion as the corresponding parts of the original fund or some intermediate proportion; and (2) on the transfer to a fund of property into which special-range property has been converted, any transfer from one part of the fund to another will have to be made which is necessary to secure that the value of the wider-range part of the fund is increased by the amount which bears the prescribed proportion to the amount by which the value of the narrower-range part is increased: see s 13(3) (repealed with savings: see PARA 1017 ante).

11 *Ie* by virtue of *ibid* s 1 (repealed with savings: see PARA 1017 ante): see PARA 1020 ante.

12 For the meaning of 'narrower-range investments' see PARA 1020 note 3 ante. As to narrower-range investments see PARAS 1021-1023 ante.

13 Trustee Investments Act 1961 s 2(2) (repealed with savings: see PARA 1017 ante). Any property belonging to the narrower-range or wider-range part of a trust fund which is converted into special-range property (see PARA 1026 post) must be carried to a separate part of the trust fund to be held with any other special-range property: Sch 2 para 2(2)(a) (repealed with savings: see PARA 1017 ante). For special provision which applies in certain cases where the powers of a trustee to invest or postpone conversion have been conferred or varied by a court order or by or under an enactment see PARA 1026 post.

14 *Ie* in pursuance of *ibid* s 2(1) (repealed with savings: see PARA 1017 ante).

15 This does not include the case of a dividend or interest becoming part of a fund: *ibid* s 2(3) (repealed with savings: see PARA 1017 ante). It does, it seems, include a bonus issue of shares.

16 On the coming into operation of any Treasury order modifying the provisions as to the division of trust funds (see note 6 supra), the requirement will be that the wider-range part of the fund is increased by an amount which bears the prescribed proportion to the amount by which the value of the narrower-range part is increased: see *ibid* s 13(3) (repealed with savings: see PARA 1017 ante).



17 Ibid s 2(3) (repealed with savings: see PARA 1017 ante). Where a person having trustee investment powers acquires property in consideration of a money payment, the acquisition of the property must be treated as investment for this purpose and not as the accrual of property to the fund, notwithstanding that the amount of the consideration is less than the value of the property acquired (eg under a rights issue of shares): see s 2(3) (repealed with savings: see PARA 1017 ante). Where any special-range property (see PARA 1026 post) accrues to a fund after the division of the fund or part of it, it is to be carried to a separate part of the fund to be held with any other special-range property: Sch 2 para 2(2)(b) (repealed with savings: see PARA 1017 ante).

18 Ie ibid s 2 (repealed with savings: see PARA 1017 ante).

19 Ibid s 2(4) (repealed with savings: see PARA 1017 ante).

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## **1026. Special-range property.**

'Special-range property' means property, including wider-range but not including narrower-range investments<sup>1</sup>, which a person having trustee investment powers is authorised to hold apart from the general statutory provisions relating to the powers of investment of trustees<sup>2</sup> and apart from any special power to invest in authorised investments conferred before 3 August 1961 or under an enactment<sup>3</sup> passed before that date<sup>4</sup>.

Where a fund includes special-range property, the provisions relating to the division of funds into a narrower-range part and a wider-range part<sup>5</sup> have effect as if references to the fund were references to so much of it as does not consist of special-range property, and the special-range property must be carried to a separate part of the fund<sup>6</sup>.

Where the powers of the person having trustee investment powers to invest or postpone conversion have been conferred or varied:

- 254 (1) by an order of the court<sup>7</sup> made within the period of ten years ending with 3 August 1961<sup>8</sup>; or
- 255 (2) by any enactment passed within that period or any instrument having effect under an enactment and made within that period, being an enactment or instrument relating specifically to the trusts in question<sup>9</sup>; or
- 256 (3) by an enactment contained in a local Act of the same session as the Trustee Investments Act 1961<sup>10</sup>,

the provisions relating to special-range property<sup>11</sup> do not apply, but certain special provisions<sup>12</sup> have effect<sup>13</sup>.

1 For the meaning of 'narrower-range investment' see PARA 1020 note 3 ante; and for the meaning of 'wider-range investment' see PARA 1020 note 5 ante. As to narrower-range investments see PARAS 1021-1023 ante; and as to wider-range investments see PARAS 1024-1025 ante.

2 I.e. the provisions of the Trustee Investments Act 1961 s 1 (repealed with savings: see PARA 1017 ante): see PARA 1020 ante.

3 I.e. any such power as is mentioned in *ibid* s 3(2) (repealed with savings: see PARA 1017 ante).

4 *Ibid* s 3(3), Sch 2 para 1 (repealed with savings: see PARA 1017 ante).

5 See *ibid* s 2(1) (repealed with savings: see PARA 1017 ante); and PARA 1025 ante.

6 *Ibid* Sch 2 para 2(1) (repealed with savings: see PARA 1017 ante). As to property which is converted into special-range property see PARA 1025 note 14 ante; as to special-range property which accrues to a trust fund see PARA 1025 note 17 ante; and as to the position where special-range property is converted into property other than special-range property see PARA 1023 ante.

7 As to the court's power to vary investment powers see PARA 1011 ante.

8 Trustee Investments Act 1961 s 3(4)(a) (repealed with savings: see PARA 1017 ante). The date referred to in the text is the date of the passing of the Trustee Investments Act 1961.

9 Ibid s 3(4)(b) (repealed with savings: see PARA 1017 ante).

10 Ibid s 3(4)(c) (repealed with savings: see PARA 1017 ante).

11 Ie ibid s 3(3), Sch 2 (repealed with savings: see PARA 1017 ante).

12 Ie ibid s 3(4), Sch 3 (repealed with savings: see PARA 1017 ante). If property belonging to the narrower-range part of a fund (see PARA 1021 ante) is invested otherwise than in a narrower-range investment, or being so invested, is retained and not transferred or as soon as may be reinvested as mentioned in s 2(2) (repealed with savings: see PARA 1017 ante) (see PARA 1025 ante), then, so long as the property continues so invested and comprised in the narrower-range part of the fund, s 1 (repealed with savings: see PARA 1017 ante) (see PARA 1020 ante) does not authorise the making or retention of any wider-range investment: Sch 3 para 1 (repealed with savings: see PARA 1017 ante). As to the effect on the liability where an investment so ceases to be authorised see Sch 3 para 2 (repealed with savings: see PARA 1017 ante).

13 Ibid s 3(4) (repealed with savings: see PARA 1017 ante).

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### **1027. Duty to obtain advice before investing.**

Before a person having trustee investment powers exercises his statutory power to invest in any of the second group of narrower-range investments<sup>1</sup> or in any wider-range investment<sup>2</sup> or before he invests in any such investment in the exercise of any special power to invest in authorised investments conferred before 3 August 1961 or conferred under any enactment passed before that date<sup>3</sup>, he must obtain and consider proper advice<sup>4</sup> on the question whether the investment is satisfactory<sup>5</sup>, having regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust, and to the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description<sup>6</sup>.

A person retaining any investment made in the exercise of such a power and in such a manner as previously mentioned must determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain advice<sup>7</sup>, and must obtain and consider advice accordingly<sup>8</sup>.

1    Ie the investments specified in the Trustee Investments Act 1961 s 1, Sch 1 Pt II (paras 1-24) (as amended; repealed with savings: see PARA 1017 ante); see PARA 1023 ante. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

2    Ie the investments specified in ibid Sch 1 Pt III (paras 1-6) (as amended; repealed with savings: see PARA 1017 ante); see PARA 1024 ante.

3    Ie in the exercise of a power falling within ibid s 3(2) (repealed with savings: see PARA 1017 ante).

4    For these purposes, 'proper advice' means the advice of a person who is reasonably believed by the person having trustee investment powers to be qualified by his ability in and practical experience of financial matters: ibid s 6(4) (s 6 repealed with savings: see PARA 1017 ante). This advice may be given by a person notwithstanding that he gives it in the course of his employment as an officer or servant: s 6(4) (repealed with savings: see PARA 1017 ante). The advice must be given or subsequently confirmed in writing: s 6(5) (repealed with savings). The requirement as to obtaining and considering advice does not apply to one of two or more trustees where he is the person giving the required advice to his co-trustee or co-trustees, or where powers of a trustee are lawfully exercised by an officer or servant competent to give proper advice: s 6(6) (repealed with savings: see PARA 1017 ante).

5    Ibid s 6(2) (repealed with savings: see PARA 1017 ante). Without prejudice to the Trustee Act 1925 s 8 (repealed), the advice required does not include, in the case of a loan on the security of freehold or leasehold property in England and Wales or Northern Ireland or on heritable security in Scotland, advice on the suitability of the particular loan: Trustee Investments Act 1961 s 6(7) (repealed with savings: see PARA 1017 ante).

6    Ibid s 6(1) (repealed with savings: see PARA 1017 ante).

7    As to the nature of the advice to be taken and the exemption of certain persons from the requirement as to the taking of advice see notes 4, 5 supra.

8    Trustee Investments Act 1961 s 6(3) (repealed with savings: see PARA 1017 ante).

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## **1028. Investment on mortgage.**

Power to invest money on mortgage<sup>1</sup> is conferred in those cases in which the statutory power of investment applies and such an investment falls within the narrower-range investments requiring advice<sup>2</sup>. If a person having trustee investment powers is authorised by the instrument to invest in real securities<sup>3</sup>, then, subject to any wider authority given by the instrument under which he acts, he may invest on mortgage only if the mortgage will enjoy priority over all others<sup>4</sup>, and not on a mortgage of a speculative or insecure description<sup>5</sup> or of a wasting character<sup>6</sup>. A person having trustee investment powers who has power to invest in real securities may not invest on a mortgage of leaseholds, except in so far as he is expressly authorised to do so by the instrument under which he acts or by statute<sup>7</sup>. Subject to any contrary intention expressed in the instrument under which he acts and to the terms of that instrument<sup>8</sup>, a person having trustee investment powers who has power to invest in real securities may invest, and is deemed always to have had power to invest, in any charge made under the Improvement of Land Act 1864<sup>9</sup>, or in a mortgage of any such charge<sup>10</sup>. A person having trustee investment powers who has power to invest in real securities may accept the security in the form of a charge by way of legal mortgage<sup>11</sup>. Where a person having trustee investment powers has power to invest in real security, a sub-mortgage may be a permissible investment<sup>12</sup>, but a stock mortgage<sup>13</sup> is not<sup>14</sup>.

In the absence of express power, a person having trustee investment powers who invests in a real security may not join in a contributory mortgage<sup>15</sup>. Persons having trustee investment powers may not lend the fund to one of their number on mortgage<sup>16</sup>. They must invest it themselves, and are not justified in handing money to their solicitor and requesting him to invest it on mortgage<sup>17</sup>.

Where, by virtue of the Limitation Act 1980<sup>18</sup>, or of an order for foreclosure<sup>19</sup> or otherwise, any property vested in persons having trustee investment powers by way of security becomes discharged from the right of redemption, they hold it in trust: (1) to apply the income from the property in the same manner as interest paid on the mortgage debt would have been applicable; and (2) if the property is sold, to apply the net proceeds of sale, after payment of costs and expenses, in the same manner as repayment of the mortgage debt would have been applicable<sup>20</sup>.

<sup>1</sup> As to the type of property in mortgages of which investment may be made see PARA 1023 heads (15), (26) ante.

<sup>2</sup> See the Trustee Investments Act 1961 ss 1(1), (4), 6(2), Sch 1 Pt II para 13 (repealed with savings: see PARA 1017 ante); and PARA 1023 ante. As to the extent to which the statutory powers of investment are capable of being cut down by the terms of a trust instrument see PARA 1018 ante. As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

<sup>3</sup> Where power has been given to invest on real securities, an investment on mortgage of the undertaking, future calls, rates, tolls and sums of money belonging to a railway company and arising under its Act has been held improper, the remedy on the security being unsatisfactory: *Mant v Leith* (1852) 15 Beav 524; *Mortimore v Mortimore* (1859) 4 De G & J 472. As to mortgages to trustees see further MORTGAGE vol 77 (2010) PARA 175 et seq.

4 *Norris v Wright* (1851) 14 Beav 291 at 308 per Romilly MR; *Drosier v Brereton* (1851) 15 Beav 221 at 226; *Webb v Ledsam* (1855) 1 K & J 385 at 387 per Wood V-C; *Lockhart v Reilly* (1857) 1 De G & J 464 at 476 per Lord Cranworth LC; *Hopgood v Parkin* (1870) LR 11 Eq 74; *Swaffield v Nelson* [1876] WN 255 at 256; *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412 at 459 per Stirling J. The dictum of Wright J in *Want v Campain* (1893) 9 TLR 254 that, notwithstanding these authorities, there is no fixed rule that a trustee must never invest on a second mortgage, appears open to question: see *Chapman v Browne* [1902] 1 Ch 785 at 800, CA, per Romer LJ. It seems that a trustee may retain a second mortgage which is part of the original trust property: see *Robinson v Robinson* (1851) 1 De GM & G 247 at 252 per Knight Bruce LJ. It is generally thought that an equitable mortgage is not a proper investment for trustees: *Swaffield v Nelson* supra. As to the priority of mortgages see MORTGAGE vol 77 (2010) PARA 258 et seq.

5 *Wyatt v Sharratt* (1840) 3 Beav 498; *Royds v Royds* (1851) 14 Beav 54; *Budge v Gummow* (1872) 7 Ch App 719; *Smethurst v Hastings* (1885) 30 ChD 490; *Learoyd v Whiteley* (1887) 12 App Cas 727, HL; *Jones v Julian* (1890) 25 LR Ir 45; *Re Walker, Walker v Walker* (1890) 62 LT 449 at 452; *Re Turner, Barker v Ivimey* [1897] 1 Ch 536. Where a trustee is authorised to lend on leasehold property, it is not necessarily improper for him to lend on leasehold property let on weekly tenancies: see *Re Solomon, Nore v Meyer* [1912] 1 Ch 261 (compromised on appeal [1913] 1 Ch 200, CA). A loan of trust money on the security of a judgment is not authorised by a power to invest upon any mortgage of freehold or leasehold estates, or any other real securities: *Johnston v Lloyd* (1844) 7 I Eq R 252.

6 *Learoyd v Whitely* (1887) 12 App Cas 727, HL; *Re Turner, Barker v Ivimey* [1897] 1 Ch 536.

7 *Re Chennell, Jones v Chennell* (1878) 8 ChD 492 at 508-509, CA. See also *Re Boyd's Settled Estates* (1880) 14 ChD 626; *Leigh v Leigh* (1886) 35 WR 121. A possible exception to this rule exists in the case of leaseholds held at a peppercorn rent for a long term: *Re Chennell, Jones v Chennell* supra at 507; *Re Boyd's Settled Estates* supra. The statutory power to invest trust money on mortgage extends to a mortgage of leasehold property of which the unexpired term is not less than 60 years: see PARA 1023 head (15) ante.

8 See the Trustee Act 1925 s 69(2); and PARA 603 ante.

9 See AGRICULTURAL LAND vol 1 (2008) PARA 620 et seq.

10 Trustee Act 1925 s 5(1)(b) (repealed with savings: see PARA 1017 ante).

11 See *ibid* s 5(2) (repealed with savings: see PARA 1017 ante).

12 *Smethurst v Hastings* (1885) 30 ChD 490.

13 In a mortgage where the loan is of government stock or its proceeds, and the repayment is to be by retransfer of stock.

14 *Pell v De Winton* (1857) 2 De G & J 13; *Whitney v Smith* (1869) 4 Ch App 513 at 521; *Bromley v Kelly* (1870) 39 LJ Ch 274.

15 *Webb v Jonas* (1888) 39 ChD 660; *Re Massingberd's Settlement, Clark v Trelawney* (1890) 63 LT 296, CA; *Stokes v Prance* [1898] 1 Ch 212 at 223-224; *Re Dive, Dive v Roebuck* [1909] 1 Ch 328 at 341-342. In *Re Godfrey, Godfrey v Faulkner* (1883) 23 ChD 483, the contributory mortgage was expressly authorised by the trust deed. In *Re Walker, Walker v Walker* (1890) 59 LJ Ch 386 at 389, Kekewich J expressed the opinion that there was not so strong an objection to a contributory investment when there was the same set of trustees for different children and grandchildren as when there was a contributory mortgage in the names of two different sets of trustees claiming under different instruments, as was the case in *Webb v Jonas* supra. In *Jones v Julian* (1890) 25 LR Ir 45 and in *Re Turner, Barker v Ivimey* [1897] 1 Ch 536, the fact that the security was an undivided share, and thus the trustees' control of it was less, was one of the considerations which induced the court to hold the investment to be a breach of trust. An express power to invest on a contributory mortgage is not infrequently to be met with.

16 *Stickney v Sewell* (1835) 1 My & Cr 8 at 14-15; *Francis v Francis* (1854) 5 De GM & G 108; *Fletcher v Green* (1864) 33 Beav 426.

17 *Rowland v Witherden* (1851) 3 Mac & G 568; *Re Dewar, Dewar v Brooke* (1885) 54 LJ Ch 830.

18 See the Limitation Act 1980 s 16; and LIMITATION PERIODS vol 68 (2008) PARA 1129 et seq.

19 See MORTGAGE vol 77 (2010) PARA 566 et seq.

20 Law of Property Act 1925 s 31(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 1(1), (2)). This is without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman: see the Law of Property Act 1925 s 31(2) (amended by the

Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 1(1), (3)). As to the execution of a subsidiary vesting deed where the mortgage money is capital money for the purposes of the settled land legislation see the Law of Property Act 1925 s 31(4) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 1(1), (5)); and SETTLEMENTS vol 42 (Reissue) PARA 701. The Law of Property Act 1925 s 31 (as amended) applies whether the right of redemption was discharged before, on or after 1 January 1912 (ie the date when the Conveyancing Act 1911 s 9 (repealed) came into operation), but without prejudice to any dealings or arrangements made before that date: Law of Property Act 1925 s 31(5).

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### **1029. Duty to investigate mortgagor's title before lending.**

A person having trustee investment powers who invests on mortgage must reasonably satisfy himself that the mortgagor can give a good title to the property<sup>1</sup>. However, he is not chargeable with breach of trust only on the ground that he has accepted a shorter title than that which, in the absence of a special contract, a purchaser is entitled to require<sup>2</sup>, if in the opinion of the court the title accepted is such as a person acting with prudence and caution would have accepted<sup>3</sup>. Similarly, where he properly lends money on the security of leasehold property, he is not chargeable with breach of trust only on the ground that in making the loan he dispensed either wholly or partly with the production or investigation of the lessor's title<sup>4</sup>.

1 *Waring v Waring* (1852) 3 L Ch R 331 at 336 per Blackburne LC. A trustee may employ a solicitor to investigate title (see *Learoyd v Whiteley* (1887) 12 App Cas 727 at 734, HL; *Blyth v Fladgate*, *Morgan v Blyth*, *Smith v Blyth* [1891] 1 Ch 337 at 360), but, if he employs the solicitor who is acting for the mortgagor, he must take additional precautions (*Waring v Waring* supra; *Sutton v Wilders* (1871) LR 12 Eq 373 at 377 per Lord Romilly MR).

2 See SALE OF LAND vol 42 (Reissue) PARA 145.

3 See the Trustee Act 1925 s 8(3), (4) (repealed). Transitional provisions in the Trustee Act 2000 provide that the repeal of the Trustee Act 1925 s 8 does not affect its operation in relation to loans or investments made before 1 February 2001: Trustee Act 2000 s 40(2), Sch 3 para 2.

4 See the Trustee Act 1925 s 8(2), (4) (repealed). As to transitional provisions see note 3 supra. See also PARA 1016 ante.



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### **1030. Duty to obtain report as to value before lending.**

As a general rule, where a person having trustee investment powers proposes to lend on the security of any property, he should obtain a report as to the value of the property from an independent surveyor or valuer before making the loan, and he should ensure that the amount lent is safely within the valuation<sup>1</sup>.

<sup>1</sup> See *Shaw v Cates* [1909] 1 Ch 389. Trustees should not be content with an out-of-date valuation: *Macleod v Annesley* (1853) 16 Beav 600; *Re Godfrey, Godfrey v Faulkner* (1883) 23 ChD 483. If trustees do not employ a local valuer, they must show circumstances to explain their selection: *Budge v Gummow* (1872) 7 Ch App 719. The Trustee Act 1925 ss 8, 9 were repealed on 1 February 2001 and consequently the limitation on liability for an excessive advance and the protection from liability for loans complying with certain conditions provided by those provisions is no longer available for loans made on or after that date. However, the repeals do not affect loans or investments made before that date: see the Trustee Act 2000 s 40(2), Sch 3 para 3; and see PARAS 1016, 1029 ante.

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### 1031. Consent and discretion as to investment.

The statutory powers of investment<sup>1</sup> must be exercised according to the discretion of the person exercising trustee investment powers, but subject to any consent or direction required by the instrument, if any, creating the power or by statute with respect to the investment of the funds<sup>2</sup>.

A person exercising trustee investment powers must exercise caution and not make an investment which in the circumstances it would be imprudent to make<sup>3</sup>. In making the investment he should take care that the income as well as the capital is properly secured<sup>4</sup>.

Where the persons exercising trustee investment powers have a controlling interest in a company, they must ensure that they or one of them will receive an adequate flow of information in time to enable them to make use of their controlling shareholding should this be necessary for the protection of that shareholding<sup>5</sup>. It may thus be convenient for the persons exercising trustee investment powers to have one of their number or a nominee on the board of directors<sup>6</sup>. It may, however, suffice for the persons exercising trustee investment powers to receive copies of the agenda, minutes of board meetings and monthly management accounts<sup>7</sup>. It will not suffice if they merely receive as much information as an ordinary shareholder receives, and no more<sup>8</sup>.

<sup>1</sup> The powers conferred by the Trustee Investments Act 1961 s 1 (repealed with savings: see PARA 1017 ante), Sch 1 (as amended; repealed with savings: see PARA 1017 ante): see PARA 1020 et seq ante.

As to the substantial repeal of the Trustee Investments Act 1961 in relation to trustees see PARA 1017 ante.

<sup>2</sup> Trustee Act 1925 s 3 (repealed). See also PARA 1007 ante.

<sup>3</sup> *Re Whiteley, Whiteley v Learoyd* (1886) 33 ChD 347 at 350, CA, per Cotton LJ, and at 358 per Lopes LJ (affd sub nom *Learoyd v Whiteley* (1887) 12 App Cas 727 at 732 et seq, HL); *Hutton v Annan* [1898] AC 289, HL; *Re Gladwin's Trust* [1919] 1 Ch 232; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA.

A trustee must not invest on mortgage merely to accommodate the mortgagor, whether a beneficiary or not, where it is of no advantage to the trust estate: *Whitney v Smith* (1869) 4 Ch App 513 at 519; *Re Walker, Walker v Walker* (1890) 62 LT 449.

As to whether in investing on mortgage a trustee may have regard to the mortgagor's solvency at the time see *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231 at 247-248 per Kekewich J.

<sup>4</sup> *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231 at 247 per Kekewich J.

<sup>5</sup> *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 533, [1980] 1 All ER 139 at 151 per Brightman J.

<sup>6</sup> *Re Lucking's Will Trusts, Renwick v Lucking* [1967] 3 All ER 726, [1968] 1 WLR 866.

<sup>7</sup> *Re Miller's Deed Trusts* [1978] LS Gaz R 454; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139.

<sup>8</sup> *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139.

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### **1032. Retainer of authorised investment.**

A person having trustee investment powers may exercise those powers by retaining authorised investments which form part of the original trust fund, unless in the circumstances it is imprudent for him to do so<sup>1</sup>.

<sup>1</sup> *Ames v Parkinson* (1844) 7 Beav 379; *Robinson v Robinson* (1851) 1 De GM & G 247 at 262-263; *Re Chapman, Cocks v Chapman* [1896] 2 Ch 763, CA; *Rawsthorne v Rowley* [1909] 1 Ch 409n, (1907) 24 TLR 51, CA; *Re Godwin's Settlement, Godwin v Godwin* (1918) 87 LJ Ch 645. As to the statutory powers of investment under the Trustee Act 2000 see PARA 1012 et seq post.

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#### **(iv) Powers as to Land**

##### **A. IN GENERAL**

#### **1033. Sources of powers.**

Trustees may have powers in relation to land:

- 257 (1) as being trustees of land<sup>1</sup>;
- 258 (2) as being the trustees of a settlement within the Settled Land Act 1925, in which case their functions are mainly consensual or supervisory<sup>2</sup>;
- 259 (3) as having become statutory owners, in which case they perform the functions of a tenant for life under the Settled Land Act 1925 until the appearance of such a tenant for life or the termination of the settlement<sup>3</sup>;
- 260 (4) as having been expressly appointed or become trustees of the settlement for the purposes of the provisions of the Settled Land Act 1925 relating to the management of land during a minority or pending a contingency, in which case they may enter into possession of the settled land and exercise over it the powers of management conferred by statute<sup>4</sup>;
- 261 (5) as being trustees under a deed of arrangement, in which case, although they will normally be trustees of the land comprised in the deed, they may have only a power of sale over it<sup>5</sup>;
- 262 (6) as being trustees of a portions term<sup>6</sup>, in which case their rights must be enforced against the estate owner<sup>7</sup>.

Trustees also have powers in relation to land under the Trustee Act 2000<sup>8</sup>.

1 See PARA 1035 post. A trustee of land is a trustee of a trust of land: Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(b). For the meaning of 'trust of land' see PARA 605 note 5 ante.

2 See SETTLEMENTS vol 42 (Reissue) PARAS 750 et seq, 788 et seq. With limited exceptions, it is no longer possible to create new settlements under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and PARA 601 note 6 ante. See also PARA 724 ante.

3 See SETTLEMENTS vol 42 (Reissue) PARA 766.

4 See the Settled Land Act 1925 s 102 (as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 758, 766. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30 et seq.

5 As to deeds of arrangement generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 859 et seq.

6 See SETTLEMENTS vol 42 (Reissue) PARA 727 et seq.

7 See the Settled Land Act 1925 s 16; and SETTLEMENTS vol 42 (Reissue) PARA 767.

8 See PARA 1034 post.

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### **1034. Power to acquire land under the Trustee Act 2000.**

The Trustee Act 2000<sup>1</sup> provides that a trustee<sup>2</sup> may acquire freehold or leasehold land<sup>3</sup> in the United Kingdom<sup>4</sup>:

- 263 (1) as an investment<sup>5</sup>;
- 264 (2) for occupation by a beneficiary<sup>6</sup>;
- 265 (3) for any other reason<sup>7</sup>.

For the purpose of exercising his functions as a trustee, a trustee who acquires land under these provisions has all the powers of an absolute owner in relation to the land<sup>8</sup>. Thus, for example, a trustee has powers of sale and leasing, and power to grant mortgages in respect of the land<sup>9</sup>.

The powers conferred by these provisions<sup>10</sup> are in addition to powers otherwise conferred on trustees, but are subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation<sup>11</sup>.

The statutory duty of care applies to a trustee exercising these powers<sup>12</sup>.

1 The Trustee Act 2000 Pt III (ss 8-10). Part III does not apply in relation to a trust of property which (despite the Trusts of Land and Appointment of Trustees Act 1996 s 2: see PARA 724 ante) consists of or includes settled land, or to a trust to which the Universities and College Estates Act 1925 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1379) applies: Trustee Act 2000 s 10(1). For the meaning of 'settled land' see PARA 991 note 2 ante. Subject to s 10(1), Pt III applies in relation to trusts whether created before or after its commencement: s 10(2). The powers conferred by Pt III are in addition to powers conferred on trustees otherwise than by Pt III, but are subject to any restriction or exclusion imposed by the trust instrument or by any statutory provision: s 9.

The Trusts of Land and Appointment of Trustees Act 1996 s 6 was amended in effect to incorporate the provisions of the Trustee Act 2000 s 8: see PARA 1035 post.

2 Ibid Pt III does not apply to trustees of authorised unit trusts (s 37(1)) or to trustees managing a fund under a common investment scheme made, or having effect as if made, under the Charities Act 1993 s 24 (see CHARITIES vol 8 (2010) PARA 419) (other than such a fund the trusts of which provide that property is not to be transferred to the fund except by or on behalf of a charity the trustees of which are the trustees appointed to manage the fund) or to trustees managing a fund under a common deposit scheme made, or having effect as if made, under s 25 (see CHARITIES vol 8 (2010) PARA 420): Trustee Act 2000 s 38. For the meaning of 'authorised unit trust' see PARA 988 note 2 ante. Nothing in Pt III applies to the trustees of any pension scheme: see s 36(3). For the meaning of 'pension scheme' see PARA 949 note 1 ante.

3 'Freehold or leasehold land' means: (1) in relation to England and Wales, a legal estate in land; (2) in relation to Northern Ireland, a legal estate in land, including land held under a fee farm grant: see *ibid* s 8(2).

4 For the meaning of 'United Kingdom' see PARA 767 note 17 ante.

5 Trustee Act 2000 s 8(1)(a).

6 *Ibid* s 8(1)(b).

7 *Ibid* s 8(1)(c).

8 *Ibid* s 8(3).

- 9 For the power to raise money by sale or mortgage see PARA 1055 post.
- 10 le the Trustee Act 2000 Pt III.
- 11 Ibid s 9(a).
- 12 See ibid ss 1, 2, Sch 1 para 2; and PARA 950 ante. As to the statutory duty of care see PARA 949 ante.

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### **1035. Powers of trustees of land.**

For the purpose of exercising their functions as trustees, the trustees of land<sup>1</sup> have in relation to the land subject to the trust all the powers of an absolute owner<sup>2</sup>. Where in the case of any land subject to a trust of land<sup>3</sup> each of the beneficiaries<sup>4</sup> interested in the land is a person of full age and capacity who is absolutely entitled to the land, the powers conferred on the trustees<sup>5</sup> include the power to convey the land to the beneficiaries even though they have not required the trustees to do so<sup>6</sup>. Where land is conveyed by virtue of these provisions, the beneficiaries must do whatever is necessary to secure that it vests in them<sup>7</sup>; and, if they fail to do so, the court may make an order requiring them to do so<sup>8</sup>.

The trustees of land have power to acquire freehold or leasehold land<sup>9</sup> in the United Kingdom<sup>10</sup>.

In exercising any powers conferred by these provisions, trustees must have regard to the rights of the beneficiaries<sup>11</sup>. Such powers must not be exercised in contravention of any other enactment or any rule of law or equity, or of any order made in pursuance of such an enactment or rule<sup>12</sup>. Where any enactment other than these provisions confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by these provisions to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or condition<sup>13</sup>.

These provisions<sup>14</sup> do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition<sup>15</sup>. If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of any general power<sup>16</sup> or the power of partition<sup>17</sup>, the power may not be exercised without that consent<sup>18</sup>. Where the powers of trustees of land are limited<sup>19</sup>, the trustees must take all reasonable steps to bring the limitation to the notice of any purchaser of the land from them, but the limitation does not invalidate any conveyance by the trustees to a purchaser who has no actual notice of the limitation<sup>20</sup>.

Where trustees of land convey land which (immediately before it is conveyed) is subject to the trust to persons believed by them to be beneficiaries absolutely entitled to the land under the trust and of full age and capacity, the trustees must execute a deed declaring that they are discharged from the trust in relation to that land; and, if they fail to do so, the court may make an order requiring them to do so<sup>21</sup>.

These provisions apply, with appropriate modifications, to personal representatives<sup>22</sup>.

1 For the meaning of 'trustees of land' see PARA 724 note 7 ante.

2 Trusts of Land and Appointment of Trustees Act 1996 s 6(1). The statutory duty of care under the Trustee Act 2000 s 1 (see PARA 949 ante) applies to trustees of land when exercising the powers conferred by the Trusts of Land and Appointment of Trustees Act 1996 s 6: see s 6(9) (added by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 45).

3 For the meaning of 'trust of land' see PARA 605 note 5 ante.

4 For the meaning of 'beneficiary' see PARA 739 note 1 ante.

5 Ie by the Trusts of Land and Appointment of Trustees Act 1996 s 6(1) (see the text and notes 1-2 supra).

6 Ibid s 6(2).

7 Ibid s 6(2)(a).

8 Ibid s 6(2)(b).

9 Ie the power to acquire land under the Trustee Act 2000 s 8 (see PARA 1034 ante).

10 Trusts of Land and Appointment of Trustees Act 1996 s 6(3) (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 45(1)).

11 Trusts of Land and Appointment of Trustees Act 1996 s 6(5). A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by s 6(5) has been complied with (s 16(1)), but this does not apply to registered land (s 16(7)). 'Purchaser' has the same meaning as in the Law of Property Act 1925 Pt I (ss 1-39) (as amended) (see SALE OF LAND vol 42 (Reissue) PARA 55): Trusts of Land and Appointment of Trustees Act 1996 s 23(1).

12 Ibid s 6(6). The reference to an order in s 6(6) includes an order of any court or of the Charity Commission: s 6(7) (amended by the Charities Act 2006 s 75(1), Sch 8 para 182). As to the Charity Commission see CHARITIES vol 8 (2010) PARAS 538-572.

Where trustees of land who convey land, which (immediately before it is conveyed) is subject to the trust, contravene the Trusts of Land and Appointment of Trustees Act 1996 s 6(6) or s 6(8) (see the text and note 13 infra), but the purchaser of the land from the trustees has no actual notice of the contravention, the contravention does not invalidate the conveyance: s 16(2). This does not apply to land held on charitable, ecclesiastical or public trusts or to registered land: see s 16(6), (7).

13 Ibid s 6(8).

14 Ie ibid s 6 (as amended) (see the text and notes 1-13 supra).

15 Ibid s 8(1). This does not apply in the case of charitable, ecclesiastical or public trusts (see s 8(3)), and has effect subject to any enactment which prohibits or restricts the effect of provision of the description mentioned in s 8(1) (see s 8(4)).

16 Ie any power conferred by ibid s 6 (as amended) (see the text and notes 1-13 supra).

17 Ie any power conferred by ibid s 7 (see PARA 1046 post).

18 Ibid s 8(2). This has effect subject to any enactment which prohibits or restricts the effect of provision of the description mentioned in s 8(2): see s 8(4).

19 Ie by virtue of ibid s 8 (see the text and notes 14-18 supra).

20 Ibid s 16(3). This does not apply to land held on charitable, ecclesiastical or public trusts or to registered land: s 16(6), (7).

21 Ibid s 16(4). A purchaser of land to which a deed under s 16(4) relates is entitled to assume that, as from the date of the deed, the land is not subject to the trust unless he has actual notice that the trustees were mistaken in their belief that the land was conveyed to beneficiaries absolutely entitled to the land under the trust and of full age and capacity: s 16(5). The provisions of s 16(4), (5) do not apply to registered land: s 16(7).

22 See ibid s 18.



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### **1036. Necessity for obtaining requisite consent and consulting beneficiaries.**

If a disposition creating a trust of land<sup>1</sup> requires the consent of more than two persons to the exercise by the trustees of any function relating to the land, the consent of any two of them to the exercise of the function is sufficient in favour of a purchaser<sup>2</sup>. Where at any time a person whose consent is expressed by a disposition creating a trust of land to be required to the exercise by the trustees of any function relating to the land is not of full age his consent is not, in favour of a purchaser, required to the exercise of the function, but the trustees must obtain the consent of a parent who has parental responsibility for him<sup>3</sup> or of a guardian of his<sup>4</sup>.

The trustees of land must in the exercise of any function relating to land subject to the trust, so far as practicable, consult the beneficiaries<sup>5</sup> of full age and beneficially entitled to an interest in possession<sup>6</sup> in the land, and, so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests)<sup>7</sup>.

1 For the meaning of 'trust of land' see PARA 605 note 5 ante.

2 Trusts of Land and Appointment of Trustees Act 1996 s 10(1). This does not apply to the exercise of a function by trustees of land held on charitable, ecclesiastical or public trusts: s 10(2).

3 Ie within the meaning of the Children Act 1989: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134.

4 Trusts of Land and Appointment of Trustees Act 1996 s 10(3).

5 For the meaning of 'beneficiary' see PARA 739 note 1 ante.

6 Even where the beneficiaries do not have an interest in possession so that the Trusts of Land and Appointment of Trustees Act 1996 s 11 does not apply, it may be appropriate for them to consider suggestions made by the beneficiaries and take them into account to the extent appropriate: see *X v A* [2000] 1 All ER 490 at 496 per Arden J; *Re Pauling's Settlement Trust, Younghusband v Coutts & Co (No 2)* [1963] Ch 576 at 586, [1963] 1 All ER 857 at 863 per Wilberforce J.

7 Trusts of Land and Appointment of Trustees Act 1996 s 11(1). Section 11(1) does not apply: (1) in relation to a trust created by a disposition in so far as provision that it does not apply is made by the disposition; (2) in relation to a trust created or arising under a will made before 1 January 1997; or (3) in relation to the exercise of the power mentioned in s 6(2) (see PARA 1035 ante) (see s 11(2)); and nor does it apply to a trust created before that date by a disposition, or a trust created after that date by reference to such a trust, unless provision to the effect that it is to apply is made by a deed executed, in a case in which the trust was created by one person and he is of full capacity, by that person or, in a case in which the trust was created by more than one person, by such of the persons who created the trust as are alive and of full capacity (see s 11(3)). A deed executed for the purposes of s 11(3) is irrevocable: s 11(4).

A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by s 11(1) has been complied with (s 16(1)), but this does not apply to registered land (s 16(7)).

There is nothing in the Trusts of Land and Appointment of Trustees Act 1996 nor in the Law Commission Report *Transfer of Land: Trusts of Land* (Law Com no 181) (1989) to suggest that the Trusts of Land and Appointment of Trustees Act 1996 s 11(1) was intended to have a wider or different effect than the Law of Property Act 1925 s 26(3) (which it replaced): see *Notting Hill Housing Trust v Brackley* [2001] EWCA Civ 601 at [15], [2001] All ER (D) 164 (Apr) at [15] per Peter Gibson LJ. The court therefore followed *Crawley Borough Council v Ure* [1996] QB 13, [1996] 1 All ER 724, CA, and *Hammersmith and Fulham Borough Council v Monk* [1992] 1 AC 478, [1992] 1

All ER 1, HL, in finding that a joint tenant of a periodic joint tenancy of a flat did not need to consult the other before terminating the periodic tenancy as failing to renew a periodic tenancy is not a positive act.

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### **1037. Power to concur with others.**

Where an undivided share in any property is subject to a trust, then, without prejudice to the trust affecting the entirety of the land and the powers of the trustees in reference to it, the trustees may execute or exercise any duty or power vested in them in relation to that share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 24 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(6)). As to undivided shares see further REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq.

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### 1038. Powers of court in relation to trusts of land.

Any person who is a trustee of land<sup>1</sup> or has an interest in property subject to a trust of land<sup>2</sup> may make an application to the court under the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup>. On an application the court may make any such order relating to the exercise by the trustees of any of their functions<sup>4</sup>, or declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit<sup>5</sup>. These provisions also apply in relation to a trust of proceeds of sale of land and trustees of such a trust<sup>6</sup>.

In determining an application for such an order the matters to which the court must have regard include<sup>7</sup>: (1) the intentions of the person or persons (if any) who created the trust<sup>8</sup>; (2) the purposes for which the property subject to the trust is held<sup>9</sup>; (3) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home<sup>10</sup>; and (4) the interests of any secured creditor<sup>11</sup> of any beneficiary<sup>12</sup>.

1 For the meaning of 'trustees of land' see PARA 724 note 7 ante.

2 For the meaning of 'trust of land' see PARA 605 note 5 ante.

3 Trusts of Land and Appointment of Trustees Act 1996 s 14(1). The powers conferred on the court by s 14 are exercisable on an application whether it is made before or after the commencement of the Act (ie 1 January 1997): s 14(4).

4 ie including an order relieving them of any obligation to obtain the consent, or to consult, any person in connection with the exercise of any of their functions: see *ibid* s 14(2). Many applications for orders under s 14 are by secured chargees seeking an order for sale. Authorities decided on the previous legislation (ie the Law of Property Act 1925 s 30 (repealed)) should be treated with caution: *Mortgage Corp Ltd v Shaire*, *Mortgage Corp Ltd v Lewis Silkin* [2001] Ch 743 at 761, [2001] 4 All ER 364 at 380 per Neuberger (disagreeing with Judge Wroath in *TSB Bank plc v Marshall, Marshall and Rodgers* [1998] 2 FLR 769 at 771-772). The Trusts of Land and Appointment of Trustees Act 1996 has given scope for some change in the court's practice: see *Bank of Ireland Home Mortgages Limited v Bell* [2001] 2 All ER (Comm) 920, [2001] 3 FCR 134 at 142 per Peter Gibson LJ.

5 Trusts of Land and Appointment of Trustees Act 1996 s 14(2). The court may not, however, make an order under s 14 as to the appointment or removal of trustees: s 14(3). As to the appointment or removal of trustees see PARAS 804 et seq, 898 et seq ante. See *Smith v Smith and Smith* (1975) 120 Sol Jo 100 (decided under earlier similar provisions).

The county court has jurisdiction under the Trusts of Land and Appointment of Trustees Act 1996 s 14, whatever the amount involved, and whatever the value of any fund or asset connected with the proceedings: High Court and County Court Jurisdiction Order 1991, SI 1991/724, art 2(1)(p) (amended by SI 1996/3141). Furthermore, an application under the Trusts of Land and Appointment of Trustees Act 1996 may be dealt with and disposed of by a district judge: CPR 2.4; *Practice Direction-Allocation of Cases to Levels of Judiciary* (1999) PD 2B. See also *Practice Direction* [1999] 3 All ER 192, [1999] 1 WLR 1128.

6 Trusts of Land and Appointment of Trustees Act 1996 s 17(2).

7 The use of the word 'include' indicates that the matters specifically referred to are not exclusive, and that all other relevant matters should be taken into account: *TSB Bank plc v Marshall, Marshall and Rodgers* [1998] 2 FLR 769, [1998] Fam Law 596. See also *Mortgage Corp Ltd v Shaire*, *Mortgage Corp Ltd v Lewis Silkin* [2001] Ch 743, [2001] 4 All ER 364.

8 Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(a). See also *Olszanecki v Hillocks* [2002] EWHC 1997 (Ch) at [50], [2004] WTLR 975 at [50] per Deputy Judge Oliver QC.

9 Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(b). See also *Olszanecki v Hillocks* [2002] EWHC 1997 (Ch) at [50], [2004] WTLR 975 at [50] per Deputy Judge Oliver QC.

10 Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(c). See also *Edwards v Lloyds TSB Bank plc* [2004] EWHC 1745 (Ch), [2005] 1 FCR 139; *Telecom Plus plc v Hatch* [2005] EWHC 1523 (Ch), [2005] All ER (D) 295 (Apr). It is for the person who resists an order for sale in reliance on the Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(c) to adduce the relevant evidence: *First National Bank v Achampong* [2003] EWCA Civ 487 at [65], [2004] 1 FCR 18 at [65] per Blackburne LJ.

11 A powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money: *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920 at [31], [2001] 3 FCR 134 at [31] per Peter Gibson LJ (citing *Mortgage Corp Ltd v Shaire*, *Mortgage Corp Ltd v Lewis Silkin* [2001] Ch 743, [2001] 4 All ER 364). For the meaning of 'beneficiary' see PARA 739 note 1 ante.

12 Trusts of Land and Appointment of Trustees Act 1996 s 15(1)(d). In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by s 13 (see PARA 739 ante), the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under s 12 (see PARA 739 ante): s 15(2). See further *Murphy v Gooch* [2007] EWCA Civ 603, [2007] All ER (D) 350 (June). In the case of any other application (other than one relating to the exercise of the power mentioned in the Trusts of Land and Appointment of Trustees Act 1996 s 6(2) (see PARA 1035 ante)), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests): s 15(3). See further *Mortgage Corp Ltd v Shaire*, *Mortgage Corp Ltd v Lewis Silkin* [2001] Ch 743 at 761, [2001] 4 All ER 364 at 381 per Neuberger J. There are special provisions on an application for the sale of land by a trustee of a bankrupt's estate: see the Insolvency Act 1986 s 335(A) (as added and amended); and MORTGAGE vol 77 (2010) PARA 623. Where those special provisions apply, the Trusts of Land and Appointment of Trustees Act 1996 s 15 does not apply to an application: s 15(4). See *Judd v Brown* [1999] Fam Law 523, 79 P & CR 491, CA.

## UPDATE

### 1038 Powers of court in relation to trusts of land

NOTE 12--*Murphy*, cited, reported at [2007] 3 FCR 96. See *Holman v Howes* [2007] EWCA Civ 877, [2007] BPIR 1085 (property purchased as joint home in attempt to reconcile relationship; husband left and sought immediate sale of property 20 years later; application refused and wife left in possession for as long as she wished).

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## **B. POWERS AS TO LEASES**

### **1039. Duty to let.**

It is the duty of a trustee of farming land to let the land at a sufficient rent and to ensure that it is kept in a good state of cultivation<sup>1</sup>. A trustee may not concur with the owner of adjoining property in letting the trust property and the adjoining property together at one rent<sup>2</sup>.

1 *Earl of Egmont v Smith*(1877) 6 ChD 469 at 475-476 per Jessel MR. Where the instrument creating the trust contains powers of leasing, its terms must be strictly adhered to: *Bowes v East London Water Works Co* (1821) Jac 324.

2 *Tolson v Sheard*(1877) 5 ChD 19, CA (mining leases).

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#### **1040. Power to renew leases.**

Since 31 December 1925 perpetually renewable leases and underleases have been abolished<sup>1</sup>. Leases and underleases may, however, still contain a provision for the renewal for a term not exceeding 60 years from the termination of the lease or underlease<sup>2</sup>. If such renewable leaseholds are vested in trustees, they may, and, if the trust instrument contains an imperative trust for renewal, they must, effect the renewal<sup>3</sup>.

1 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 541.

2 See the Law of Property Act 1922 s 145, Sch 15 para 7(2); and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 140. As to renewable leaseholds see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 538-542; SETTLEMENTS vol 42 (Reissue) PARAS 975-980.

3 See SETTLEMENTS vol 42 (Reissue) PARA 975.

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### **C. POWERS OF SALE AND PARTITION**

#### **1041. Exercise of trust or power to sell.**

Where a trustee holds the trust property on trust for sale, or exercises a power of sale contained in the instrument creating the trust<sup>1</sup> or conferred by statute<sup>2</sup> he must endeavour to sell the property to the best advantage<sup>3</sup>, and must not offer it for sale in a way calculated to depreciate its value or prejudice the sale<sup>4</sup>. He must ascertain the estimated value of the property, and, unless he is bound to sell in all events, may not sell at an undervalue<sup>5</sup>. If a trustee acts in good faith, the court does not interfere with his discretion as to the time and mode of sale<sup>6</sup>. A settlor may relieve trustees from liability for loss arising from a decision not to sell<sup>7</sup>. If the trust or power of sale is to arise on the death of a beneficiary for life, it cannot be exercised previously even with his concurrence<sup>8</sup>. It may subsist, for the purposes of division, after all the beneficiaries have become entitled in possession<sup>9</sup>.

No purchaser paying money on a sale or mortgage purporting to be made under any trust or power vested in trustees is to be concerned to see that such money is wanted or that no more than is wanted is raised or otherwise to its application<sup>10</sup>.

1 A limitation of time within which the power is to be exercised is merely directory, and a subsequent exercise of it is not invalid: *Buxton v Buxton* (1835) 1 My & Cr 80; *Pearce v Gardner* (1852) 10 Hare 287; *Cuff v Hall* (1855) 1 Jur NS 972; *Edwards v Edmunds* (1876) 34 LT 522 at 524 per Hall V-C. As to selling property which the trustee had no authority to purchase see *Re Patten and Edmonton Union Poor Guardians* (1883) 52 LJ Ch 787; *Power v Banks*[1901] 2 Ch 487 at 496 per Cozens-Hardy J; *Re Jenkins and HE Randall & Co's Contract*[1903] 2 Ch 362. As to selling with the concurrence of beneficiaries where there is no power of sale see *Re Baker and Selmon's Contract*[1907] 1 Ch 238. As to when the power is at an end see *Trower v Knightley* (1821) 6 Madd 134; *Re Douglas and Powell's Contract*[1902] 2 Ch 296; *Re Gordon and Adam's Contract, Re Pritchard's Settled Estate*[1914] 1 Ch 110, CA. As to the invalidity of powers of sale arising beyond the perpetuity period see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1034; as to the extinguishment and suspension of powers generally see POWERS vol 36(2) (Reissue) PARA 977 et seq; and as to the sale of Scottish land held under an English trust see *Campbell-Wyndham-Long's Trustees, Petitioners*1951 SC 685, 1952 SLT 43, Ct of Sess. As to the inability of trustees to purchase from themselves see PARA 938 et seq ante. A trust for sale of land is now subsumed under a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 4, 5; para 605 note 5 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 66. For the meaning of 'trust of land' see PARA 605 note 5 ante.

2 See eg the Trustee Act 1925 s 16; the Trusts of Land and Appointment of Trustees Act 1996 s 6 (as amended; prospectively amended); and PARA 1035 ante.

3 Trustees have an overriding duty to obtain the best price which they can for their beneficiaries, which may justify them in committing a breach of commercial morality: *Buttle v Saunders*[1950] 2 All ER 193 (where it was held that trustees had a duty to probe a higher offer despite negotiations with another purchaser having reached an advanced stage).

4 *Pechel v Fowler* (1795) 2 Anst 549; *Downes v Grazebrook* (1817) 3 Mer 200; *Ord v Noel* (1820) 5 Madd 438 at 440 per Leach V-C; *Anon* (1821) 6 Madd 10 at 11; *Rede v Oakes* (1864) 4 De GJ & Sm 505 at 512, 514; *Dance v Goldingham*(1873) 8 Ch App 902; *Re Cooper and Allen's Contract for Sale to Harlech*(1876) 4 ChD 802 at 815 et seq per Jessel MR; *Dunn v Flood*(1885) 28 ChD 586, CA; *Grove v Search, Griffin v Search* (1906) 22 TLR 290. As to the statutory duty of trustees of land in certain cases to give effect to the wishes of their beneficiaries see PARA 1036 ante. Apart from statute, a trustee in executing a trust for sale is not bound by the wishes of a beneficiary (*Selby v Bowie* (1863) 9 Jur NS 432 (affd 2 New Rep 2); *Grove v Search, Griffin v Search* supra), and may be held liable if, in deference to those wishes, he neglects to sell advantageously to the trust estate (*Taylor v Tabrum* (1833) 6 Sim 281). Where he is empowered to sell by private contract, he need not negotiate for a



higher bid from persons offering to purchase before closing with one of them: *Harper v Hayes* (1860) 2 De GF & J 542. On sale of part of the mortgaged property by the mortgagor, a trustee-mortgagee may release that part from the mortgage, if he receives the whole of the purchase money (*Re Morrell and Chapman's Contract*[1915] 1 Ch 162), but, if he does not receive the whole of the purchase money, the propriety of the release must depend on the value of the property retained in mortgage. As to the effect of statutory powers of sale in curtailing the necessity for inserting express powers in trust instruments see POWERS vol 36(2) (Reissue) PARA 229. As to sale by auction see PARA 1042 post; and AUCTION vol 2(3) (Reissue) PARA 233 et seq. As to the purchaser's lien in certain circumstances see LIEN vol 68 (2008) PARA 864 et seq. As to conveyances and covenants for title by trustees who sell see SALE OF LAND vol 42 (Reissue) PARAS 338, 349-351.

5 *Campbell v Walker* (1800) 5 Ves 678 at 680 per Arden MR; *Oliver v Court* (1820) 8 Price 127 at 165 per Richards CB; *Re Cooper and Allen's Contract for Sale to Harlech*(1876) 4 ChD 802 at 815. As to the sale of timber at a valuation see SALE OF LAND vol 42 (Reissue) PARA 88.

6 *Thomas v Williams*(1883) 24 ChD 558; *Re Blake, Jones v Blake*(1885) 29 ChD 913, CA. See, however, *Robinson v Briggs* (1853) 1 Sm & G 188; *Marshall v Sladden* (1851) 4 De G & Sm 468 (trustees acted improperly). As to the absolute statutory power of sale conferred on a tenant for life see SETTLEMENTS vol 42 (Reissue) PARA 827.

7 The settlor can authorise the trustees to ignore the interests of the beneficiaries in which case the trustees will commit no breach of trust as against those beneficiaries unless the trustees exercise their discretion improperly: *Hayim v Citibank NA*[1987] AC 730, PC, at 746.

8 *Blacklow v Laws* (1842) 2 Hare 40; *Johnstone v Baber* (1845) 8 Beav 233; *Want v Stallibrass*(1873) LR 8 Exch 175; *Smith v Great Northern Rly Co* (1874) 23 WR 126; *Carlyon v Truscott*(1875) LR 20 Eq 348; *Re Bryant and Barningham's Contract*(1890) 44 ChD 218, CA; *Re Head's Trustees and Macdonald* (1890) 38 WR 657, CA; but see *Mills v Dugmore* (1861) 30 Beav 104. As to the power of sale under the Settled Land Act 1925 see SETTLEMENTS vol 42 (Reissue) PARA 827.

9 *Peters v Lewes and East Grinstead Rly Co*(1881) 18 ChD 429 at 435, CA, per Jessel MR; *Re Lord Sudeley and Baines & Co*[1894] 1 Ch 334; *Re Jump, Galloway v Hope*[1903] 1 Ch 129; *Talbot v Scarisbrick*[1908] 1 Ch 812; *Re Horsnail, Womersley v Horsnail*[1909] 1 Ch 631; *Re Kaye and Hoyle's Contract* (1909) 53 Sol Jo 520.

10 Trustee Act 1925 s 17. See also *City of London Building Society v Flegg*[1988] AC 54, [1987] 3 All ER 435, HL.

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## **1042. Statutory provisions as to sales.**

If and so far as a contrary intention is not expressed in the instrument creating the trust or power, and subject to the provisions of that instrument<sup>1</sup>, where a trustee has a duty or power to sell property, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots<sup>2</sup>, by public auction<sup>3</sup> or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit; and he may vary any contract for sale, and buy in at any auction, or rescind any contract for sale and resell, without being answerable for any loss<sup>4</sup>. A duty or power to sell or dispose of land includes a duty or power to sell or dispose of part of it, whether the division is horizontal, vertical or made in any other way<sup>5</sup>.

1 See the Trustee Act 1925 s 69(2); and PARA 603 ante.

2 In the case of a sale of leaseholds in lots in exercise of a trust for sale the conditions may properly provide for the granting of underleases of lots sold in the event of the whole not being disposed of: *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, CA. See also *Re Clarke's Will Trusts, Alexander v Clarke* [1920] 1 IR 47. As to the power of trustees to collaborate with other persons interested where an undivided share in the proceeds of sale of land, or in any other property, is subject to the trust see PARA 1037 ante. A trust for sale of land is now subsumed under a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 ss 1, 4, 5; para 605 note 5 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 66. For the meaning of 'trust of land' see PARA 605 note 5 ante.

3 As to sale by auction see AUCTION vol 2(3) (Reissue) PARA 233 et seq.

4 Trustee Act 1925 s 12(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(2)(a)). The Trustee Act 1925 s 12(1) (as amended) does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner: s 12(3).

5 Ibid s 12(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 3(2)(b)).

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### **1043. Joint sale apart from statute.**

Apart from statute<sup>1</sup>, the power of a trustee invested with a power of sale to concur with another person in the sale of trust property jointly with adjacent or other property, or in the sale of a share or interest subject to the trust jointly with the remaining shares or interest in the same property for one entire sum, depends on whether the trust property or share or interest can be so sold advantageously, and whether a proper apportionment of the purchase money is possible<sup>2</sup>. The purchaser is entitled to be satisfied that the sale is not disadvantageous to the trust estate and that the purchase money has been apportioned<sup>3</sup>, and in a proper case the apportionment, in default of agreement, will be made by the court<sup>4</sup>.

<sup>1</sup> For statutory powers to convey in the exercise of powers in the case when an undivided share in property is subject to a trust see PARA 1037 ante.

<sup>2</sup> *Clark v Seymour* (1834) 7 Sim 67; *Rede v Oakes* (1864) 4 De GJ & Sm 505; *Cavendish v Cavendish* (1875) 10 Ch App 319; *Morris v Debenham* (1876) 2 ChD 540; *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802 at 814 et seq.

<sup>3</sup> *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802 at 815 et seq. The terms of the trust may, however, render it unnecessary that the apportioned parts of the purchase money should be paid separately: *Re Parker and Beech's Contract* (1887) 56 LJ Ch 358 at 359, CA, per Lindley LJ.

<sup>4</sup> *Clark v Seymour* (1834) 7 Sim 67; *Cavendish v Cavendish* (1875) 10 Ch App 319.

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#### **1044. Sale subject to depreciatory condition.**

On a sale<sup>1</sup> by a trustee, a purchaser may not make any objection to the title on the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory<sup>2</sup>. A beneficiary may not impeach the sale on that ground unless it also appears that the consideration for the sale was thereby rendered inadequate<sup>3</sup>; nor may the sale be impeached as against the purchaser on that ground after the execution of the conveyance, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made<sup>4</sup>.

1 For the meaning of 'sale' see PARA 882 note 2 ante.

2 Trustee Act 1925 s 13(3). See also s 13(1), (2); and the text and notes 3-4 infra. Section 13 applies to sales whenever they were made: s 13(4).

3 Ibid s 13(1).

4 Ibid s 13(2).

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#### **1045. Forms of conveyance.**

In a conveyance a trustee may rely on the provisions of the Law of Property Act 1925 as to the covenants and other provisions implied in a conveyance<sup>1</sup>.

<sup>1</sup> See the Law of Property Act 1925 s 182; and PARA 1116 post.

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### **1046. Power to partition.**

The trustees of land<sup>1</sup> may, where beneficiaries<sup>2</sup> of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money<sup>3</sup>. The trustees must give effect to any such partition by conveying the partitioned land in severalty (whether or not subject to any legal mortgage created for raising equality money), either absolutely or in trust, in accordance with the rights of those beneficiaries<sup>4</sup>. Before exercising these powers the trustees must obtain the consent of each of those beneficiaries<sup>5</sup>. Where a share in the land is affected by an incumbrance, the trustees may either give effect to it or provide for its discharge from the property allotted to that share as they think fit<sup>6</sup>. If a share in the land is absolutely vested in a minor, these provisions apply as if he were of full age, except that the trustees may act on his behalf and retain land or other property representing his share in trust for him<sup>7</sup>.

These provisions do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition<sup>8</sup>. If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of any general power<sup>9</sup> or the power of partition<sup>10</sup>, the power may not be exercised without that consent<sup>11</sup>.

These provisions apply, with appropriate modifications, to personal representatives<sup>12</sup>.

1 For the meaning of 'trustees of land' see PARA 601 ante.

2 For the meaning of 'beneficiary' see PARA 739 note 1 ante.

3 Trusts of Land and Appointment of Trustees Act 1996 s 7(1). Section 7(1) is subject to the Commonhold and Leasehold Reform Act 2002 s 21 (part-unit: interests) and s 22 (part-unit: charging); Trusts of Land and Appointment of Trustees Act 1996 s 7(6) (added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 8).

4 Trusts of Land and Appointment of Trustees Act 1996 s 7(2).

5 Ibid s 7(3). A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by s 7(3) has been complied with (s 16(1)), but this does not apply to registered land (s 16(7)).

6 Ibid s 7(4).

7 Ibid s 7(5).

8 Ibid s 8(1). This does not apply in the case of charitable, ecclesiastical or public trusts (see s 8(3)), and has effect subject to any enactment which prohibits or restricts the effect of provision of the description mentioned in s 8(1) (see s 8(4)).

9 Ie under ibid s 6 (prospectively amended) (see PARA 1035 ante).

10 Ie under ibid s 7.

11 Ibid s 8(2). This has effect subject to any enactment which prohibits or restricts the effect of provision of the description mentioned in s 8(2): see s 8(4).

12 See ibid s 18.



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## **(v) Power to Insure**

### **1047. Power to insure against loss or damage.**

A trustee may insure any property which is subject to the trust against risks of loss or damage due to any event, and may pay the premiums out of the trust funds<sup>1</sup>. Where the property is held on a bare trust<sup>2</sup>, however, the power to insure is subject to any direction given by the beneficiary (or each of them) that any property specified in the direction is not to be insured, or is only to be insured on specified conditions<sup>3</sup>. If such a direction is given, the power to insure ceases to be a delegable function<sup>4</sup> so far as it is subject to the direction<sup>5</sup>.

These provisions do not impose any duty to insure. The position at common law is unclear<sup>6</sup>. A failure by trustees to exercise a power to insure (whether statutory or express), in circumstances where a reasonable person would have done so, may constitute a breach of the trustees' duty to act in the best interests of the beneficiaries<sup>7</sup>. Moreover, the statutory duty of care applies to a trustee when exercising the statutory power to insure, or any corresponding power, however conferred<sup>8</sup>. The duty of care will cover, for example, the selection of an insurer and the terms on which the insurance cover is taken out. A trustee has an insurable interest in the trust property<sup>9</sup>.

1 Trustee Act 1925 s 19(1) (s 19 substituted by the Trustee Act 2000 s 34(1)). 'Trust funds' means any income or capital funds of the trust: Trustee Act 1925 s 19(5) (as so substituted). The provisions of s 19 (as substituted) apply in relation to trusts whether created before or after the commencement of the Trustee Act 2000: s 34(3).

2 Property is held on a bare trust if it is held on trust for: (1) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust; or (2) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust: Trustee Act 1925 s 19(3) (as substituted: see note 1 supra).

3 See *ibid* s 19(2) (as substituted: see note 1 supra).

4 *Id* for the purposes of the Trustee Act 2000 s 11: see PARA 989 ante.

5 Trustee Act 1925 s 19(4) (as substituted: see note 1 supra).

6 In *Re Betty* [1899] 1 Ch 821 at 829, North J suggested that trustees ought to insure at the expense and for the benefit of the estate. See also *Re Kingham, Kingham v Kingham* [1897] 1 IR 170. However, in *Bailey v Gould* (1840) 4 Y & C Ex 221 and *Fry v Fry* (1859) 27 Beav 144 at 146, the court found that there was no duty to insure against fire on the particular facts. In *Re McEacharn, Gambles v McEacharn* [1911] WN 23, the court refused to compel trustees to use a statutory power to insure against the risk of fire at the expense of the life tenant. The Law Commission stated that it was not recommending the imposition of a statutory duty to insure but that 'a failure to insure may in certain circumstances amount to a breach of the trustees' paramount duty to act in the best interests of the beneficiaries': see *Trustees' Powers and Duties* (Law Com no 260) (1999) PARA 3.21.

7 As to the duty to act in the best interests of the beneficiaries see PARA 954 et seq ante.

8 See the Trustee Act 2000 ss 1, 2, Sch 1 para 5; and PARA 950 ante. As to the statutory duty of care see PARA 949 ante.

9 Where there is a power to insure, there has never been any doubt that a trustee may insure the whole beneficial interest in property in which he holds only the legal estate and that he may recover from the insurers



the entire diminution of its value notwithstanding that the beneficial owners were not co-insureds: see *Lonsdale and Thompson Ltd v Black Arrow Group plc* [1993] Ch 361 at 369, [1993] 3 All ER 648 at 653 per Williamson QC (he is accountable to the beneficiaries for such insurance proceeds as he may receive).

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### **1048. Application of insurance money.**

Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement<sup>1</sup> is capital money for the purposes of the trust or settlement where the policy has been kept up: (1) under any trust in that behalf; or (2) under any power, statutory or otherwise<sup>2</sup>; or (3) in performance of any covenant or obligation, statutory or otherwise; or (4) by a tenant for life impeachable for waste<sup>3</sup>.

If receivable in respect of settled land<sup>4</sup> or any building or works on it, the money is deemed to be capital money arising under the Settled Land Act 1925 from the settled land, and must be invested or applied by the trustees or, if in court, under the direction of the court accordingly<sup>5</sup>. If the money was receivable in respect of personal chattels settled as heirlooms<sup>6</sup>, it is deemed to be capital money arising under the Settled Land Act 1925, and is applicable by the trustees or, if in court, under the direction of the court, in like manner as provided by that Act with respect to money arising by a sale of chattels settled as heirlooms<sup>7</sup>. If the money was receivable in respect of land subject to a trust of land or personal property held on trust for sale, it is to be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust<sup>8</sup>. In any other case, the money is to be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable<sup>9</sup>.

In any case the money or any part of it may be applied by the trustees, or, if in court, under the direction of the court, in rebuilding, reinstating, replacing or repairing the property lost or damaged<sup>10</sup>. However, the money may only be so applied: (a) with the consent of any person whose consent to the investment of money subject to the trust is required by the instrument, if any, creating the trust; and (b) in the case of money deemed to be capital money arising under the Settled Land Act 1925, subject to the provisions of that Act relating to the application of capital money by the trustees of the settlement<sup>11</sup>.

If the money payable under the policy is receivable by any person other than the trustees of the trust or settlement, that person must use his best endeavours to recover and receive the money; and, after discharging any costs of recovery and receipt, he must pay the balance of the money to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge for it, he must pay it into court<sup>12</sup>.

Nothing in the statutory provisions prejudices or affects the right of any person to require money to be applied in rebuilding, reinstating or repairing the property lost or damaged, or the rights of any mortgagee, lessor or lessee, whether under any statute or otherwise<sup>13</sup>.

1    Ie within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 675 et seq.

2    Eg under the Trustee Act 1925 s 19 (as amended): see PARA 1047 ante.

3    Ibid s 20(1) (amended by the Trustee Act 2000 ss 34(2), 40(3), Sch 4 Pt II). For cases outside this provision see *Re Quicke's Trusts, Poltimore v Quicke* [1908] 1 Ch 887; *Re McEacharn, Gambles v McEacharn* [1911] WN 23; *Re Bladon, Dando v Porter* [1911] 2 Ch 350 (affd [1912] 1 Ch 45, CA).

The Trustee Act 1925 s 20 (as amended) applies to policies effected before or after the date of commencement of the Act (ie 1 January 1926), but only to money received after that date: s 20(6).

4    Ie within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 680.

5 Trustee Act 1925 s 20(3)(a). As to the application of capital money see SETTLEMENTS vol 42 (Reissue) PARA 794 et seq.

6 le under the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 942 et seq.

7 Trustee Act 1925 s 20(3)(b). As to the application of proceeds of the sale of heirlooms see SETTLEMENTS vol 42 (Reissue) PARA 943.

8 Ibid s 20(3)(c) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(5)).

9 Trustee Act 1925 s 20(3)(d).

10 Ibid s 20(4).

11 Ibid s 20(4). As to the application of capital money see SETTLEMENTS vol 42 (Reissue) PARA 794 et seq.

12 Ibid s 20(2).

13 Ibid s 20(5).

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## (vi) Maintenance and Advancement

### 1049. Maintenance.

The trust instrument may contain express powers for providing maintenance or education for, or otherwise benefiting, a beneficiary who is a minor<sup>1</sup>. Where the power is discretionary, as is usually the case, the duty of the trustees is to have regard exclusively to the best interests of the beneficiaries and ignore those of the settlor or any other person<sup>2</sup>.

Apart from any such express powers and subject to any contrary intention expressed in the trust instrument<sup>3</sup>, where a trustee holds property in trust for any person for any interest whatsoever<sup>4</sup>, whether vested or contingent, he has statutory power during the minority of that person, subject to any prior interests or charges affecting that property, at his discretion to pay to that person's parent or guardian, if any, or otherwise apply for or towards his maintenance, education or benefit the whole or such part, if any, of the income<sup>5</sup> of the property as may in all the circumstances be reasonable, and must accumulate any surplus income<sup>6</sup>. In deciding whether the whole or any part of the income should be applied for such purposes, the trustees must have regard to the age of the minor and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable to those purposes<sup>7</sup>. Once the beneficiary attains his majority, the trustees must pay a beneficiary's share of income to him even if his interest is still contingent under the terms of the trust<sup>8</sup>.

1 As to the exercise and duration of express powers of maintenance see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 58 et seq.

2 *Re Lofthouse*(1885) 29 ChD 921, CA; *Fuller v Evans*[2000] 1 All ER 636, [2000] Fam Law 542 (trustees are not precluded from exercising the power by paying children's school fees, where to do so would confer an incidental (and unintended) benefit on the settlor who was bound by a consent order in divorce proceedings to pay such fees).

3 See the Trustee Act 1925 s 69(2); and PARA 603 ante. A direction to accumulate income amounts to a contrary intention as it is necessarily inconsistent with a power to apply income for maintenance: *Re Henderson's Trusts*, *Schreiber v Baring*[1969] 3 All ER 769, [1969] 1 WLR 651, CA; *Re Erskine's Settlement Trusts*, *Hollis v Pigott*[1971] 1 All ER 572, [1971] 1 WLR 162.

4 The powers stated in the text do not apply where the instrument, if any, under which the interest arises came into operation before 1 January 1926: Trustee Act 1925 s 31(5). For statutory powers applicable in the case of an instrument which came into operation before 1 January 1926 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 61.

5 For these purposes, 'income' includes rents and profits: *ibid* s 68(1) PARA (10).

6 See *ibid* s 31 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 63.

7 See *ibid* s 31(1) proviso; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 64.

8 *Re Jones' Will Trusts*, *Soames v A-G*[1947] Ch 48, [1946] 2 All ER 281.

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## 1050. Advancement.

The trust instrument may authorise the trustees to make advances out of the capital of any fund in which a minor or other person has a vested or presumptive or contingent interest<sup>1</sup>. Apart from any such express authority conferred by the trust instrument, but subject to any contrary intention expressed in it<sup>2</sup>, under a trust constituted or created after 31 December 1925<sup>3</sup> trustees have statutory power in their absolute discretion to pay or apply capital money<sup>4</sup> subject to the trust for the advancement or benefit<sup>5</sup> of any person entitled to the capital of the trust property or any share of it, not exceeding altogether in amount half the presumptive or vested share or interest of that person in the trust property<sup>6</sup>, whether the person is entitled to the capital or a share of it absolutely or contingently on his attaining any specified age or on the occurrence of any other event or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion<sup>7</sup>. Such an advance may be made notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation or to be diminished by the increase of the class to which he belongs<sup>8</sup>. The power of advancement is not an administrative power<sup>9</sup>.

1 For examples of proper and improper exercises of a power of advancement see *Re Pauling's Settlement Trusts*, *Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA; *Re Clore's Settlement Trusts*, *Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955. For a general consideration of such powers see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 73 et seq. For the general principles as to the exercise in good faith of trustees' powers of advancement see *Re Hastings-Bass*, *Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193, CA.

2 See the Trustee Act 1925 s 69(2); and PARA 503 ante. See also *Re Evans' Settlement*, *Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294; *Re Henderson's Trusts*, *Schreiber v Baring* [1969] 3 All ER 769, [1969] 1 WLR 651, CA; *Henley v Wardell* (1988) Times, 29 January; cf *IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320, CA (where it was held that a duty to accumulate is not necessarily inconsistent with a power of advancement).

3 See the Trustee Act 1925 s 32(3). The date referred to in the text is the commencement date of the Trustee Act 1925.

4 Ibid s 32 (as amended) does not apply to capital money arising under the Settled Land Act 1925: Trustee Act 1925 s 32(2) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(8)). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 78; SETTLEMENTS. Assets may be transferred in specie: *Re Collard's Will Trusts*, *Lloyds Bank Ltd v Rees* [1961] Ch 293, [1961] 1 All ER 821.

5 This is a use of the money which will improve the material situation of the beneficiary including settling the property on different trusts for the beneficiary: see *Pilkington v IRC* [1964] AC 612 at 635, [1962] 3 All ER 622 at 628 per Lord Radcliffe. It has been held to extend to a payment to a beneficiary to allow donation to charity: *Re Clore's Settlement Trusts*, *Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955; cf *X v A* [2005] EWHC 2706 (Ch), [2006] 1 All ER 952, [2006] 1 WLR 741. See also *Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Lowther v Bentinck* (1874) LR 19 Eq 166; *Re Breed's Will* (1875) 1 ChD 226; *Re Garrett*, *Croft v Ruck* [1934] Ch 477; *Re Halsted's Will Trusts*, *Halsted v Halsted* [1937] 2 All ER 570; *Re CL* [1969] 1 Ch 587, [1968] 1 All ER 1104; *Re Hampden Settlement Trusts* [1977] TR 177; *Abacus (CI) Ltd (trustee of the Esteem Settlement and the Number 52 Trust) v Al Sabah* (2001) 4 ITELR 555, Jersey Court of Appeal.

6 See the Trustee Act 1925 s 32(1) proviso (a). In appropriate cases the court will use its powers under the Variation of Trusts Act 1958 to remove the limitation to permit the statutory power to be exercised in relation to the whole, not only half of the fund: *D (a child) v O* [2004] EWHC 1036 (Ch), [2004] 3 All ER 780, [2004] 3 FCR 195.

7 See the Trustee Act 1925 s 32(1); *Pilkington v IRC* [1964] AC 612, [1962] 3 All ER 622, HL; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 76 et seq. The money advanced must be brought into account if the person advanced is or becomes absolutely and indefeasibly entitled to a share in the trust property (see s 32(1) proviso (b)), and no advance may be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money advanced unless that person is in existence and of full age and consents in writing to the advance being made (see s 32(1) proviso (c)). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 77. The advancement of capital without the consent of a prior income beneficiary given pursuant to statute is invalid, even where the power of advancement is expressed to be subject to an uncontrolled discretion, unless there is an express exclusion of the Trustee Act 1925 s 32(1) proviso (c): *Henley v Wardell* (1988) Times, 29 January. In *Re Marquess of Abergavenny's Estate Act Trusts, Marquess of Abergavenny v Ram* [1981] 2 All ER 643, [1981] 1 WLR 843, where the trustees had expressed power to advance to the life tenant 'any part or parts not exceeding in all one-half in value of the settled fund', it was held that an advance of half the value of the settled fund exhausted the power so that it ceased to be exercisable in the future even though the retained assets had subsequently increased in value.

8 See the Trustee Act 1925 s 32(1).

9 *D (a child) v O* [2004] EWHC 1036 (Ch) at [6], [2004] 3 All ER 780 at [6], [2004] 3 FCR 195 at [6] per Lloyd J.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(vii) Various Particular Powers/1051. Power to give receipts.

## (vii) Various Particular Powers

### 1051. Power to give receipts.

Notwithstanding anything to the contrary in the instrument, if any, creating the trust, a trustee's written receipt for any money, securities<sup>1</sup>, investments or other personal property<sup>2</sup> or effects payable, transferable or deliverable to him under any trust or power is a sufficient discharge to the person paying, transferring or delivering the same, and effectually exonerates him from seeing to the application or being answerable for any loss or misapplication thereof<sup>3</sup>. However, except where the trustee is a trust corporation<sup>4</sup>, this provision does not enable a valid receipt for the proceeds of sale or other capital money arising under a trust of land<sup>5</sup>, or for capital money arising under the Settled Land Act 1925, to be given by a sole trustee<sup>6</sup>.

1 For the meaning of 'securities' see PARA 917 note 1 ante.

2 For the general meaning of 'property' see PARA 605 note 1 ante.

3 Trustee Act 1925 s 14(1), (3) (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 19). Where there are several trustees, other than charitable or other trustees entitled to act by majority instead of unanimously, they must all join in the receipt: *Crewe v Dicken* (1798) 4 Ves 97; *Walker v Symonds* (1818) 3 Swan 1 at 63; *Hall v Franck* (1849) 11 Beav 519; *Webb v Ledsam* (1855) 1 K & J 385; *Margetts v Perks* (1864) 12 WR 517; *Lee v Sankey* (1873) LR 15 Eq 204; *Re C Flower and Metropolitan Board of Works, Re M Flower and Metropolitan Board of Works* (1884) 27 ChD 592. As to the effect of joining in the receipt see PARA 1115 post.

4 For the meaning of 'trust corporation' see PARA 798 ante.

5 For the meaning of 'trust of land' see PARA 605 note 5 ante.

6 Trustee Act 1925 s 14(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 3(3)). As to the disability of a sole trustee, not being a trust corporation, to give valid receipts see PARA 799 ante. See also PARA 986 ante. As sole trustee may act alone in all matters involving no receipt of capital money: *Re Myhill, Hull v Myhill* [1928] Ch 100. Where a survivor of joint tenants becomes solely and beneficially interested in land held in trust, he is entitled to deal with his legal estate as if it were not held in trust: Law of Property Act 1925 s 36(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 3 para 4). If he elects to do so, he is not affected by the Trustee Act 1925 s 14(2) (as amended): see the Law of Property (Joint Tenants) Act 1964 s 1 (as amended); and SALE OF LAND vol 42 (Reissue) PARA 74.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(vii) Various Particular Powers/1052. Power to compound debts.

### **1052. Power to compound debts.**

If and so far as a contrary intention is not expressed in the instrument creating the trust, and subject to the terms of that instrument<sup>1</sup>, a personal representative<sup>2</sup> or two or more trustees acting together, or, subject to the statutory restrictions relating to receipts by a sole trustee not being a trust corporation<sup>3</sup>, a sole acting trustee where by the instrument, if any, creating the trust or by statute a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he thinks or they think fit:

- 266 (1) accept any property<sup>4</sup>, real or personal, before the time at which it is made transferable or payable<sup>5</sup>; or
- 267 (2) sever and apportion any blended trust funds or property<sup>6</sup>; or
- 268 (3) pay or allow any debt or claim on any evidence that he thinks or they think sufficient<sup>7</sup>; or
- 269 (4) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed<sup>8</sup>; or
- 270 (5) allow any time of payment of any debt<sup>9</sup>; or
- 271 (6) compromise<sup>10</sup>, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust<sup>11</sup>,

and, for any of those purposes, may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as may seem expedient, without being responsible for any loss occasioned by any act or thing so done by them or him if he has or they have discharged the duty of care<sup>12</sup>.

1 See the Trustee Act 1925 s 69(2); and PARA 603 ante.

2 For the meaning of 'personal representative' see PARA 602 note 1 ante.

3 For the meaning of 'trust corporation' see PARA 798 ante.

4 For the meaning of 'property' see PARA 605 note 1 ante.

5 Trustee Act 1925 s 15(a).

6 Ibid s 15(b).

7 Ibid s 15(c).

8 Ibid s 15(d).

9 Ibid s 15(e).

10 The court has jurisdiction to exercise the discretion on behalf of the trustees and to sanction a compromise and in so doing it has regard to the interests of all concerned: *Re Ezekiel's Settlement Trusts*, *National Provincial Bank Ltd v Hyam* [1942] Ch 230, [1942] 2 All ER 224, CA; *Re Earl of Strafford*, *Royal Bank of Scotland v Byng* [1980] Ch 28, [1979] 1 All ER 513, CA. The court will only accept a surrender of discretion for good reason such as where the trustees are deadlocked or disabled by conflict of interest: see *Abacus (CI) Ltd v Hirschfield* (2001) 4 ITELR 686, Jersey Royal Court, Samedi Division at 689 per Commissioner Smith (citing with



approval *Public Trustee v Paul Cooper & Co* [1999] All ER (D) 1524, in which Hart J adopted the statement of Walker J in *Re The S Settlement* (2001) 4 ITELR 206, Jersey Royal Court, Samedi Division).

11 Trustee Act 1925 s 15(f). See *Re Shenton* [1935] Ch 651 (where there was an agreement to treat a claim as preferential under a deed of arrangement). There is no reason why trustees should not be able to compromise or otherwise deal with a debt arising under the Pensions Act 1995 s 75 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 850): *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] EWHC 1461 (Ch), [2002] ICR 1427. Moral considerations may be relevant to an exercise of the power to compromise but there must be a genuine legal claim to compromise: see *A-G v Trustees of the British Museum (Commission for Looted Art in Europe intervening)* [2005] EWHC 1089 (Ch), [2005] Ch 397 (a case on the powers of charity trustees). For the powers of charity trustees to compromise claims and make ex gratia payments see CHARITIES vol 8 (2010) PARAS 421-423.

12 Trustee Act 1925 s 15 (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 20). The duty of care mentioned in the text is the one set out in the Trustee Act 2000 s 1: see PARA 949 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(vii) Various Particular Powers/1053. Powers in regard to reversionary interests etc.

### **1053. Powers in regard to reversionary interests etc.**

If trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, then on the same falling into possession<sup>1</sup>, or becoming payable or transferable, the trustees may:

- 272 (1) agree or ascertain the amount or value<sup>2</sup> of the share, interest or other thing in action or of any part of it in such manner as they may think fit<sup>3</sup>;
- 273 (2) accept in or towards satisfaction of it, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments<sup>4</sup>;
- 274 (3) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable<sup>5</sup>;
- 275 (4) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of the release<sup>6</sup>.

Trustees are not responsible in any such case for any loss occasioned by any act or thing if they have discharged the duty of care<sup>7</sup>.

Trustees are not under any obligation and are not chargeable with any breach of trust by reason of any omission to place any stop notice or apply for any stop or other like order upon any securities or other property out of or on which any such share or interest or other thing in action is derived, payable or charged, or to take any proceedings on account of any act, default or neglect on the part of the persons in whom such securities or other property or any of them or any part of it are for the time being, or had at any time been, vested, unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken<sup>8</sup>.

1 For these purposes, 'possession' includes receipt of rents and profits or the right to receive the same, if any: Trustee Act 1925 s 68(1) PARA (10). As to things in action see CHOSER IN ACTION vol 13 (2009) PARA 1 et seq.

2 As to the power to procure valuations see PARA 1054 post.

3 Trustee Act 1925 s 22(1)(a).

4 Ibid s 22(1)(b).

5 Ibid s 22(1)(c).

6 Ibid s 22(1)(d).

7 Ibid s 22(1) (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 22(a)). The duty of care mentioned in the text is the duty of care set out in the Trustee Act 2000 s 1: see PARA 949 ante.

8 Trustee Act 1925 s 22(2). Nothing in s 22(2) relieves the trustees of the obligation to get in and obtain payment or transfer of the share or interest or other thing in action on the same falling into possession: s 22(2) proviso.



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#### **1054. Power to procure and act on valuations.**

For the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time, trustees may, by duly qualified agents, ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made is binding upon all persons interested under the trust if the trustees have discharged the duty of care<sup>1</sup>.

<sup>1</sup> Trustee Act 1925 s 22(3) (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 22(b)). The duty of care mentioned in the text is the duty of care set out in the Trustee Act 2000 s 1(1): see PARA 949 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(vii) Various Particular Powers/1055. Power to raise money by sale or mortgage.

### **1055. Power to raise money by sale or mortgage.**

Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they have power to raise the money required by sale<sup>1</sup>, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession<sup>2</sup>. On a sale or mortgage purporting to be made under any trust or power vested in trustees, the purchaser or mortgagee paying or advancing the money is not to be concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to its application<sup>3</sup>.

1 For the meaning of 'sale' see PARA 882 note 2 ante.

2 Trustee Act 1925 s 16(1). For the meaning of 'possession' see PARA 1053 note 1 ante. Section 16 is retrospective (s 16(1)) and applies notwithstanding anything to the contrary contained in the trust instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes or to trustees of a settlement for the purposes of the Settled Land Act 1925 not being also the statutory owners (Trustee Act 1925 s 16(2)). For these purposes, 'statutory owner' has the same meaning as in the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 766): Trustee Act 1925 s 68(1) PARA (15). Trustees may not use s 16 to gear up the trust fund by mortgaging trust property to provide cash to enable further property to be acquired by the trust: *Re Suenson-Taylor's Settlement Trusts, Moores v Moores* [1974] 3 All ER 397, [1974] 1 WLR 1280.

3 Trustee Act 1925 s 17. See *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(2) POWERS OF TRUSTEES/(vii) Various Particular Powers/1056. Appropriation of specific portions of the trust property.

### **1056. Appropriation of specific portions of the trust property.**

Trustees have wide, but not fully defined, inherent powers of appropriation<sup>1</sup>.

Where under the instrument creating the trust the trustees have power to sell trust property to a beneficiary, they may instead from time to time agree with a beneficiary absolutely entitled to a share of the trust property for the appropriation of a specific portion of it as his share<sup>2</sup>. A beneficiary who is a minor and incapable of consenting to an appropriation can, however, still be bound by an appropriation if it is done fairly upon a proper valuation<sup>3</sup>. Trustees can make a valid appropriation of a part of the trust property to one beneficiary without making a corresponding appropriation to the others<sup>4</sup> provided that the appropriation is fairly made<sup>5</sup>. Where the trusts are for specific sums to be held on separate trusts, a severance of funds may be the most proper course<sup>6</sup>. However, in the case of income interests, an interest in half the income of an undivided fund is different from the whole income of a divided half of that fund, so that an appropriation into two moieties varies the beneficial interests and necessitates an application under the Variation of Trusts Act 1958 if there is no express power of appropriation in the trust deed<sup>7</sup>. To be valid, an appropriation by trustees must, in general, be only of investments authorised by law or the particular trust instrument<sup>8</sup>, unless the beneficiary consents<sup>9</sup>, and must be sufficient at the date of conversion<sup>10</sup>. Trustees may employ a qualified valuer to ascertain and fix the value of any trust property<sup>11</sup>. The rule against self dealing applies to trustees and personal representatives<sup>12</sup>.

1 *Lewin on Trusts* (17th Edn, 2000) p 1015.

2 *Re Beverly, Watson v Watson* [1901] 1 Ch 681 at 685 per Buckley J. See also *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA, at 215 per Lindley LJ.

3 *Re Ruddock, Newberry v Mansfield* (1910) 102 LT 89, CA (trustees ordered to pay costs of an application to the court to obtain an apportionment which had been refused by the trustees when it would have been perfectly easy for them to carry one out).

4 *Re Richardson, Morgan v Richardson* [1896] 1 Ch 512; *Re Nickels, Nickels v Nickels* [1898] 1 Ch 630.

5 *Re Lepine, Dowsett v Culver* [1892] 1 Ch 210, CA at 218 per Fry LJ. Where the trustees are authorised to postpone sale, a beneficiary who is absolutely entitled cannot insist on immediate payment of his share: *Re Kipping, Kipping v Kipping* [1914] 1 Ch 62, CA.

6 *Fraser v Murdoch* (1881) 6 App Cas 855, HL, at 865 per Lord Selborne. After the appropriation neither portion of the trust property is liable to make good a subsequent depreciation in the other portion; *Re Walker, Walker v Walker* (1890) 62 LT 449 at 451 per Kekewich J.

7 *Re Freeston's Charity* [1979] 1 All ER 51 at 60, [1978] 1 WLR 741 at 751-752. As to applications under the Variation of Trusts Act 1958 see PARA 1062 et seq post.

8 *Fraser v Murdoch* (1881) 6 App Cas 855, HL. See *Re Owthwaite, Owthwaite v Taylor* [1891] 3 Ch 494.

9 *Re Cooke's Settlement, Tarry v Cooke* [1913] 2 Ch 661. The trustees may take into account the wishes of the life tenant so long as they do not unduly favour the life tenant at the expense of the remainderman: *Fraser v Murdoch* (1881) 6 App Cas 855, HL, at 864 per Lord Selborne.

10 *Re Waters, Preston v Waters* [1889] WN 39.

11 See PARA 1054 ante. The appropriation may be treated as a transfer of the cash value of the appropriated investments (*Re Gollin's Declaration of Trust, Turner v Williams* [1969] 3 All ER 1591, [1969] 1 WLR 1858) or of a proportion of the whole trust fund (*Re Leigh's Settlement Trusts* [1981] CLY 2453).

12 *Kane v Radley-Kane* [1999] Ch 274, [1998] 3 All ER 753. A trustee may only appropriate to himself property having a fixed ascertainable value: *Re Bythway, Gough v Dames* (1911) 80 LJ Ch 246. As to appropriation by an executor or administrator see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 573 et seq.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(3) INTERVENTION BY THE COURT/(i) Determination of Specific Questions/1057. Power to apply to the court.

### **(3) INTERVENTION BY THE COURT**

#### **(i) Determination of Specific Questions**

##### **1057. Power to apply to the court.**

Where a trustee is in doubt as to his right course of action, he is entitled to take the court's opinion<sup>1</sup>, and in general a trustee is entitled to the reasonable protection and direction of a court of equity in the exercise of his trust<sup>2</sup>. If, however, he obstinately, capriciously or unreasonably refuses to act without that protection, he will be ordered to pay the costs of the proceedings for obtaining it<sup>3</sup>. A trustee or a beneficiary may bring a claim in the High Court for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration claim<sup>4</sup>. When exercising its jurisdiction to give directions on a trustee's application, the court is engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties<sup>5</sup>. A trustee should not bring or defend a claim without the court's sanction, as otherwise he does so at his own risk as to costs<sup>6</sup>. The decision of a court of first instance completely protects and indemnifies a trustee in respect of what he does in accordance with it<sup>7</sup>. If he appeals from it to a higher tribunal, he does so at his own risk<sup>8</sup>; and, if he fails, he will be ordered to pay the costs of the appeal<sup>9</sup>.

1 *Talbot v Earl of Radnor* (1834) 3 My & K 252 at 253 per Leach MR; *Iredell v Iredell* (1854) 18 Beav 202; *King v King* (1857) 1 De G & J 663; *Merlin v Blagrove* (1858) 25 Beav 125 at 137-138 per Romilly MR; *Rose v Sharrod* (1863) 11 WR 356; *Re Earl of Radnor's Will Trusts* (1890) 45 ChD 402 at 423, CA, per Lord Esher MR; *Re Yorke, Stone v Chataway* [1997] 4 All ER 907. The trustee must provide the court with all relevant material for the court will not act on incomplete information: *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, PC. A trustee invested with an absolute discretion may obtain the direction of the court as to its exercise: *Law Guarantee Trust and Accident Society v Munich Re-insurance Co* [1912] 1 Ch 138 at 156 per Warrington J.

2 *Taylor v Glanville* (1818) 3 Madd 176 at 178 per Leach V-C; *Curteis v Candler* (1821) 6 Madd 123; *Goodson v Ellisson* (1827) 3 Russ 583 at 589 per Lord Gifford MR; *Gardiner v Downes* (1856) 22 Beav 395 at 397 per Romilly MR; *King v King* (1857) 1 De G & J 663; *Barker v Peile* (1865) 2 Drew & Sm 340; *Cook v Harvey* [1874] WN 69. See also PARA 1070 post. Where the matter is in doubt, a trustee has a right to take proceedings to ascertain whether any amount is due from or to him to or from his beneficiary: *Singleton v Selwyn* (1863) 9 LT 408 at 409 per Wood V-C. As to the right of a trustee to a release see PARA 925 ante.

3 *Taylor v Glanville* (1818) 3 Madd 176 at 178; *Goodson v Ellisson* (1827) 3 Russ 583 at 589; *Re Cabburn, Gage v Rutland* (1882) 46 LT 848. The trustee may not charge the expense of obtaining the protection upon the trust property where no responsibility on his part is involved, or where his motive is obviously vexatious: *Curteis v Candler* (1821) 6 Madd 123. See also *Re Ruddock, Newberry v Mansfield* (1910) 102 LT 89, CA.

4 See CPR 64.2. As to the general power to apply by claim form for an order for the execution of a trust to be carried out under the direction of the court or for the court to determine any question arising in the execution of a trust see CPR Pt 64; *Practice Direction-Estates, Trusts and Charities* PD 64; *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust* PD 64b. In the case of such applications the court has power to make a prospective costs order: see *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust* PD 64b para 6; and see also PARAS 635-636 ante.

5 *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, PC. There is a distinction between cases where trustees seek the approval by the court of a proposed exercise by them of their discretion



and where they surrender their discretion to the court: *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick*[1966] 1 All ER 740 at 743, [1966] 1 WLR 499 at 503 per Buckley J. In cases where there is a surrender, the court has an unfettered discretion to decide what should be done in the best interests of the trust; where there is no surrender, the primary focus of the court's attention must be on the views of the trustees and the exercise of discretion proposed by the trustees: *Royal Society for the Prevention of Cruelty to Animals v A-G*[2001] 3 All ER 530, [2002] 1 WLR 448.

6 See *Re Beddoe, Downes v Cottam*[1893] 1 Ch 547, CA; *Dagnell v JL Freedman & Co (a firm)*[1993] 2 All ER 161, [1993] 1 WLR 388, HL. See also *McDonald v Horn*[1995] 1 All ER 961, CA. As to the right of a trustee to the costs of legal proceedings see PARA 906 et seq ante.

7 *Underwood v Hatton* (1842) 5 Beav 36; *Foster v M'Mahon* (1847) 11 I Eq R 287; *Rowland v Morgan* (1848) 13 Jur 23 at 26 per Lord Cottenham LC; *Smith v Smith* (1861) 1 Drew & Sm 384 at 387 per Kindersley V-C; *Re Earl of Radnor's Will Trusts*(1890) 45 ChD 402 at 423, CA.

8 *Rowland v Morgan* (1848) 13 Jur 23 at 26; *Tucker v Hernaman* (1853) 4 De GM & G 395 at 404; and see *Re Londonderry's Settlement, Peat v Walsh*[1965] Ch 918, [1964] 3 All ER 855, CA (where contrasting views were expressed by Harman LJ and Salmon LJ as to whether trustees should initiate an appeal).

9 *Re Butterworth, ex p Russell*(1882) 19 ChD 588, CA; *Re Earl of Radnor's Will Trusts*(1890) 45 ChD 402 at 423, CA, per Lord Esher MR.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(3) INTERVENTION BY THE COURT/(i) Determination of Specific Questions/1058. Administration on basis that a woman is past child-bearing.

### **1058. Administration on basis that a woman is past child-bearing.**

There has long been a practice by which the court gives liberty to pay money out of court or to administer trust funds on the footing that a woman is no longer able to give birth to a child<sup>1</sup>. The practice has been based on convenience of administration and on the existence of a high degree of improbability that children will be born<sup>2</sup>. The application to court is not for a variation of the existing trusts; it is an application to the court in its administrative jurisdiction for leave to carry out the existing trusts without variation on the footing that the impossible will not happen<sup>3</sup>. The practice has been applied not only in relation to a married woman, but also in relation to a widow who has had children, or a spinster<sup>4</sup>. The court is cautious of accepting any rule laid down by former decisions as to age, and will bear in mind that more accurate medical evidence has become available<sup>5</sup>. The presumption that a woman is past child-bearing is not made where its effect will be to deprive another person of a chance of becoming entitled if a child is born<sup>6</sup>, or, in the case of an instrument taking effect before 16 July 1964<sup>7</sup>, where the purpose is to render inapplicable the rule against perpetuities<sup>8</sup>. In relation to instruments taking effect on or after 16 July 1964 it is to be presumed, where a perpetuity question arises, that a male can have a child at the age of 14 or over but not under that age, and that a female can have a child at the age of 12 or over but not under that age or over the age of 55<sup>9</sup>.

An application for administration on the basis that a man's age precludes the possibility of issue will not be entertained<sup>10</sup>.

1 For examples of cases where an order was made see *Edwards v Tuck* (1856) 23 Beav 268 (age 58); *Re Widow's Trusts* (1871) LR 11 Eq 408 (ages 53 and 55); *Re Millner's Estate* (1872) LR 14 Eq 245 (age 49; married 26 years; no children); *Re Summer's Trusts* (1874) 30 LT 377 (special medical evidence); *Re Allason's Trusts* (1877) 36 LT 653 (age 41; married 15 years; no children); *Re Taylor's Settlement Trusts* (1881) 43 LT 795 (age 52); *Re Thornhill, Thornhill v Nixon* [1904] WN 112 (age 52; last child 22 years previously); *Carr v Carr* (1912) 106 LT 753 (age 51; insurance policy taken out to replace fund in the event of a child being born). For cases where an order was withheld see *Davies v Weld* (1683) 1 Vern 181; *Croxtton v May* (1878) 9 ChD 388 (age 54; married three years only); *Re Hocking, Michell v Loe* [1898] 2 Ch 567, CA; *Re Cazenove, Perkin v Bland* (1919) 122 LT 181.

2 *Re Dawson, Johnston v Hill* (1888) 39 ChD 155. Except under the Perpetuities and Accumulations Act 1964 ss 2, 14 (see the text and note 9 infra), there is no presumption as to the particular age at which a woman becomes past child-bearing; but in the case of a woman in her seventies not only would the trustees be authorised to distribute a fund on the footing that she is past child-bearing but the court would consider it an unnecessary waste of money for the trustees to come to the court and ask leave so to distribute. Trustees can with complete safety and propriety deal with their funds on the basis that a woman of 70 will not have a further child: *Re Pettifor's Will Trusts, Roberts v Roberts* [1966] Ch 257, [1966] 1 All ER 913. The courts have not yet been called on to consider recent advances in cryobiology: see the Human Fertilisation and Embryology Act 1990 ss 27(1), 28(6)(b); *The Rules against Perpetuities and Excessive Accumulations* (Law Com no 133); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1026.

3 *Re Pettifor's Will Trust, Roberts v Roberts* [1966] Ch 257 at 260, [1966] 1 All ER 913 at 915 per Pennicuik J. See also *Figg v Clarke (Inspector of Taxes)* [1997] 1 WLR 603, [1997] STC 247.

4 See eg *Re Widow's Trusts* (1871) LR 11 Eq 408; *Re Taylor's Settlement Trusts* (1881) 43 LT 795; *Re White, White v Edmond* [1901] 1 Ch 570.

5 *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n, [1963] 1 WLR 820 (thrice married; last child 27 years previously; medical evidence).

6 *Re Hocking, Michell v Loe* [1898] 2 Ch 567, CA; *Re Cazenove, Perkin v Bland* (1919) 122 LT 181. An application for variation of trusts may be joined with an application for an order on the footing of child-bearing being past: see *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n, [1963] 1 WLR 820.

7 le the date on which the Perpetuities and Accumulations Act 1964 came into force.

8 *Re Dawson, Johnston v Hill* (1888) 39 ChD 155.

9 See the Perpetuities and Accumulations Act 1964 ss 2(1)(a), 14, 15(5). In the case of a living person evidence may be given to show that he or she will not be able to have a child at the time in question: s 2(1)(b). See further PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1066, 1120.

10 *P v N* (1896) 31 L Jo 690.

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## (ii) Variation of Trusts

### A. IN GENERAL

#### 1059. Deviation from terms of trust.

Circumstances may arise in which it seems necessary or beneficial for a trustee to deviate from the strict letter of the trust. If, however, he does so and his act is subsequently challenged, he will have acted at the risk of being held liable for breach of trust<sup>1</sup>, unless:

- 276 (1) he acted with the consent of all the beneficiaries, of whom all were sui juris<sup>2</sup>;  
or
- 277 (2) he acted under statutory sanction<sup>3</sup>; or
- 278 (3) he obtained the sanction of the court to his act before he so acted<sup>4</sup>; or
- 279 (4) the trust directions from which he deviated were illegal<sup>5</sup> or incapable of being observed<sup>6</sup>.

1 As to the court's power to relieve a trustee from personal liability for a breach of trust where he has acted honestly and reasonably and ought fairly to be excused for the breach and for omitting to obtain the directions of the court see the Trustee Act 1925 s 61; and PARA 1123 post. See also *Harrison v Randall* (1851) 9 Hare 397 at 407 per Turner V-C (where it was held that, when a trustee deviates from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the court that the deviation was necessary or beneficial).

2 *Wilkinson v Parry* (1828) 4 Russ 272 at 276 per Leach MR; *Griffiths v Porter* (1858) 25 Beav 236 at 241 per Romilly MR; *Bradby v Whitchurch* [1868] WN 81; *Wharton v Masterman*[1895] AC 186, HL; *Re Baker and Selmon's Contract*[1907] 1 Ch 238.

3 See eg the Lands Clauses Consolidation Act 1845 s 7 (as amended) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 553); and the Settled Land Act 1925 s 108(2) (see SETTLEMENTS vol 42 (Reissue) PARA 881).

4 *King v King* (1857) 1 De G & J 663. The court will not ordinarily override the terms of the trust: *Blacklow v Laws* (1842) 2 Hare 40; *Johnstone v Baber* (1845) 8 Beav 233; *Re New, Re Leavers, Re Morley*[1901] 2 Ch 534, CA. See also *Re Wells, Boyer v Maclean*[1903] 1 Ch 848 (where contingent interests were made absolute although minors were concerned). In *Re Wells, Boyer v Maclean* supra derivative settlements in which minors were interested had been made by the persons contingently entitled to the corpus, who were all sui juris. No alteration was required of any of the trusts of these settlements. What was proposed was that the trustees of the derivative settlements should receive a present and certain subject matter instead of their previously existing contingent rights: see *Chapman v Chapman*[1954] AC 429 at 464, [1954] 1 All ER 798 at 815, HL. As to the limits of the court's inherent jurisdiction to modify trusts see further PARA 1060 post. The court may confer on trustees the power necessary to carry out transactions which appear to be expedient but cannot be effected owing to the absence of any power for the purpose vested in the trustees by the trust instrument or by law: see the Trustee Act 1925 s 57; and PARA 1061 post. In addition, the court has wide powers to vary the terms of trusts under the Variation of Trusts Act 1958 s 1 (as amended): see PARA 1062 et seq post.

5 *Re Beard, Reversionary and General Securities Co Ltd v Hall, Re Beard, Beard v Hall*[1908] 1 Ch 383.

6 *Collett v Collett* (1866) 35 Beav 312; *Re Bird, Bird v Cross* (1894) 8 R 326.

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## 1060. Inherent jurisdiction.

The court gives effect to the intention of the settlor or testator as expressed in the trust instrument<sup>1</sup> and has not arrogated to itself any inherent overriding power to disregard or rewrite the trusts<sup>2</sup>. However, apart from cases where a change has been effected in a minor's property<sup>3</sup>, or the court has approved a compromise on behalf of minors and of possible after-born beneficiaries<sup>4</sup>, there have been cases<sup>5</sup> in which the court<sup>6</sup> has allowed trustees exceptionally to obtain remuneration or increased remuneration for their services<sup>7</sup> or to enter into some beneficial business transaction by way of management<sup>8</sup> or salvage<sup>9</sup> or in emergency<sup>10</sup>, which was not a transaction authorised by the trust<sup>11</sup>, and cases in which, in allowing maintenance out of income, the court has altered beneficial interests<sup>12</sup>, for example because accumulation is thereby suspended<sup>13</sup>. Nevertheless, the court's inherent jurisdiction to modify private trusts is limited; but in relation to public charitable trusts the court has a wider power and discretion and, although it cannot alter the valid object of the trust, it may, according to the circumstances of the case, vary the mode of its attainment<sup>14</sup>.

1 See *Re Hazeldine's Trusts* [1908] 1 Ch 34 at 40-41, CA (where Farwell LJ approved of the view that the court's business is to execute trusts not to alter them). See also eg *Johnstone v Baber* (1845) 8 Beav 233; *Re Walker, Walker v Duncombe* [1901] 1 Ch 879 at 885.

2 See *Chapman v Chapman* [1954] AC 429 at 451, [1954] 1 All ER 798 at 807, HL, per Lord Morton. See also *Re Crawshaw, Dennis v Crawshaw* (1888) 60 LT 357; *Re Montagu, Derbishire v Montagu* [1897] 2 Ch 8, CA; *Re Morrison, Morrison v Morrison* [1901] 1 Ch 701 at 707 per Buckley J.

3 See eg *Earl of Winchelsea v Norcliffe* (1686) 1 Vern 435; *Pierson v Shore* (1739) 1 Atk 480; *Bridges v Bridges* (1752) 12 App Cas 693n; *Inwood v Twyne* (1762) Amb 417; *Lord Ashburton v Lady Ashburton* (1801) 6 Ves 6; *Glover v Barlow* (1831) 21 ChD 788n; *Re Jackson, Jackson v Talbot* (1882) 21 ChD 786; *Worthington v M'Craer* (1856) 23 Beav 81 and EQUITY. A similar jurisdiction has been exercised in the case of persons suffering from mental disorder: *Chapman v Chapman* [1954] AC 429 at 452, [1954] 1 All ER 798 at 808, HL. See also eg *Re Carr's Trusts, Carr v Carr* [1904] 1 Ch 792, CA (where a fund to which a person suffering from mental disorder was absolutely entitled was ordered to be brought into court and the income to be paid to one of the trustees to be applied for the maintenance of that person); and MENTAL HEALTH vol 30(2) (Reissue) PARA 680. There is, however, no inherent jurisdiction to alter trusts of settlements and minors' interests merely because it would be beneficial to do so: *Re Heyworth's Contingent Reversionary Interest* [1956] Ch 364 at 371, sub nom *Re Heyworth's Settlements* [1956] 2 All ER 21 at 24. The court of Chancery has an ancient jurisdiction to authorise the application of income and, in more limited circumstances, capital but, while the Variation of Trusts Act 1958 does not take away any jurisdiction the court already has, it is more appropriate to proceed under that Act, where possible: *D (a child) v O* [2004] EWHC 1036 (Ch) at [12], 7 ITELR 63 at [12] per Lloyd J.

4 See *Chapman v Chapman* [1954] AC 429 at 457, [1954] 1 All ER 798 at 811, HL. As to what constitutes a compromise of disputed rights for this purpose see *Re Lord Hylton's Settlement, Barclays Bank Ltd v Jolliffe* [1954] 2 All ER 647n, [1954] 1 WLR 1055, CA (where the court approved the proposed scheme); *Re Powell-Cotton's Re-settlement, Henniker-Major v Powell-Cotton* [1956] 1 All ER 60, [1956] 1 WLR 23, CA (where ambiguity in a clause did not entitle the court to substitute a better one).

5 The position considered in the text is that which exists apart from the statutory powers conferred by the Trustee Act 1925 s 57 (see PARA 1061 post), the Settled Land Act 1925 s 64 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 671-672) and the Variation of Trusts Act 1958 s 1 (as amended) (see PARA 1062 et seq post).

6 Ie the Chancery Division of the High Court. The Family Division has express statutory powers under the Matrimonial Causes Act 1973 s 24 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq) to alter ante-nuptial or post-nuptial settlements. See also PARA 667 note 7 ante.

7 *Re Duke of Norfolk's Settlement Trusts, Earl of Perth v Fitzalan-Howard* [1982] Ch 61, [1981] 3 All ER 220, CA.

8 There is a distinction between sanctioning variations for purposes of management or administration of the trust property and sanctioning variations of beneficial trusts: cf *Re New, Re Leavers, Re Morley* [1901] 2 Ch 534 at 544, CA; cited in *Chapman v Chapman* [1954] AC 429 at 453, [1954] 1 All ER 798 at 808-809, HL.

9 *Frith v Cameron* (1871) LR 12 Eq 169; *Re Jackson, Jackson v Talbot* (1882) 21 ChD 786; *Ferguson v Ferguson* (1886) 17 LR Ir 552 at 570, Ir CA; *Conway v Fenton* (1888) 40 ChD 512; *Re Montagu, Derbishire v Montagu* [1897] 1 Ch 685 at 691 et seq per Kekewich J (affd [1897] 2 Ch 8, CA); *Re Hawker's Settled Estates* (1897) 66 LJ Ch 341; *Re Waldegrave, Earl Waldegrave v Earl of Selborne* (1899) 81 LT 632; *Re Legh's Settled Estate* [1902] 2 Ch 274 at 280 per Kekewich J; *Neill v Neill* [1904] 1 IR 513. The court requires to be satisfied of a necessity amounting to actual salvage; and *Re Household, Household v Household* (1884) 27 ChD 553, *Conway v Fenton* supra and *Neill v Neill* supra cannot be relied on as establishing any general principle on which the court would act. For instances in which transactions which did not have the nature of salvage were not sanctioned see *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v De Teissier* [1893] 1 Ch 153; *Re Lord de Tabley, Leighton v Leighton* (1896) 75 LT 328; *Re Montagu, Derbishire v Montagu* supra; *Re Willis, Willis v Willis* [1902] 1 Ch 15, CA; *Re Legh's Settled Estates* supra; *Re Tollemache* [1903] 1 Ch 457 (on appeal [1903] 1 Ch 955 at 956, CA). Where the terms of the trust disposition require the consent of a beneficiary to an act which is required for the safety or benefit of the trust property, the court may direct it to be performed without that consent: *Lechmere v Earl of Carlisle* (1733) 3 P Wms 211 at 220; *Costello v O'Rorke* (1869) IR 3 Eq 172 at 184. In proper cases the court orders costs incurred in proceedings for the preservation of the trust property to be charged on or paid out of the capital of the property: *Re Lord Rivers' Estate* (1874) 16 ChD 588n; *Re Earl De la Warr's Estates* (1881) 16 ChD 587; *Re Ormrod's Settled Estate* [1892] 2 Ch 318 at 325-326. See also PARA 748 ante.

10 See *Re New, Re Leavers, Re Morley* [1901] 2 Ch 534, CA (trustees authorised to concur in a scheme for the reconstruction of a company); cf *Re Hazeldine, Public Trustee v Hazeldine* [1918] 1 Ch 433 (retention of unauthorised investments for period of war and further six months).

11 See *Chapman v Chapman* [1954] AC 429 at 452-455, [1954] 1 All ER 798 at 808-810, HL.

12 See *Re Walker, Walker v Duncombe* [1901] 1 Ch 879. See also eg *Revel v Watkinson* (1748) 1 Ves Sen 93; *Cavendish v Mercer* (1776) 5 Ves 195n; *Greenwell v Greenwell* (1800) 5 Ves 194; *Errat v Barlow* (1807) 14 Ves 202; *Haley v Bannister* (1820) 4 Madd 275; *Havelock v Havelock, Re Allan* (1881) 17 ChD 807; *Re Collins, Collins v Collins* (1886) 32 ChD 229.

13 As to the propositions stated in the text generally see *Chapman v Chapman* [1954] AC 429 at 451, [1954] 1 All ER 598 at 807-808, HL.

14 *Andrews v M'Guffog* (1886) 11 App Cas 313 at 316, HL, per Lord Watson. Accordingly, in the case of a charitable trust, the court has jurisdiction, where the Attorney General consents or does not object, to authorise by way of scheme proposals such as a proposal to enlarge the scope of permissible investments, which it would have no jurisdiction to do in the case of a private trust: see *Re Royal Society's Charitable Trusts, Royal Society v A-G* [1956] Ch 87, [1955] 3 All ER 14; *Re Royal Naval and Royal Marine Children's Homes, Portsmouth, Lloyds Bank Ltd v A-G* [1959] 2 All ER 716n, [1959] 1 WLR 755; and PARA 1011 note 3 ante. Cf *Re Campden Charities* (1881) 18 ChD 310, CA (application of fund to education). The Charity Commission has concurrent jurisdiction with the court: see the Charities Act 1993 s 16(1) (as amended); and CHARITIES vol 8 (2010) PARA 187.

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## **B. VARIATION UNDER THE TRUSTEE ACT 1925**

### **1061. Jurisdiction under the Trustee Act 1925.**

The inherent jurisdiction of the court to modify trusts was always sparingly exercised, and after 31 December 1925<sup>1</sup>, and more particularly since the passing of the Variation of Trusts Act 1958<sup>2</sup>, there can be very few cases in which the need to invoke this power will arise<sup>3</sup>.

Under the Trustee Act 1925<sup>4</sup>, if in the management or administration<sup>5</sup> of any property vested in trustees any sale<sup>6</sup>, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is, in the court's<sup>7</sup> opinion, expedient, but cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law<sup>8</sup>, the court may<sup>9</sup> by order confer on the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income<sup>10</sup>. If the court sanctions such an arrangement, the effect is as if the power conferred for the purpose by the order had been inserted in the trust instrument as an overriding power, and no forfeiture of a protected life interest results from the exercise of the power<sup>11</sup>. Before making an order the court must be satisfied that the transaction in question is expedient for the trust as a whole, and not merely in the interest of one beneficiary<sup>12</sup>. This statutory jurisdiction has often been exercised so as to enable the debts of a tenant for life to be paid out of capital money subject to the recoupment of the money advanced by means of an insurance policy<sup>13</sup>, but has also been exercised in relation to transactions of various kinds<sup>14</sup>.

The court also has power under this statutory jurisdiction to vary the investment powers conferred by a trust instrument<sup>15</sup>.

1 The court was given power to authorise transactions not authorised by the trust instrument under the Trustee Act 1925 s 57: see the text and note 9 infra. As to the court's power to authorise transactions under the Settled Land Act 1925 s 64 (as amended) see SETTLEMENTS vol 42 (Reissue) PARAS 670-671.

2 The Variation of Trusts Act 1958 received royal assent on 23 July 1958. As to the court's wide powers to vary trusts under the Variation of Trusts Act 1958 see PARA 1062 et seq post.

3 See *D (a child) v O*[2004] EWHC 1036 (Ch) at [12], 7 ITELR 63 at [12] per Lloyd J.

4 In addition to the statutory jurisdiction under the Trustee Act 1925 s 57, the court has also a jurisdiction to approve a transaction on behalf of a minor under s 53 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 71): see *Re Gower's Settlement*[1934] Ch 365; *Re Heyworth's Settlements*[1956] Ch 364, [1956] 2 All ER 21; *Re Meux, Gilmour v Gilmour*[1958] Ch 154, [1957] 2 All ER 630; *Re Bristol's Settled Estates, Bristol v Jermyn*[1964] 3 All ER 939, [1965] 1 WLR 469; *Re Lansdowne's Will Trusts, Marquis of Lansdowne v Earl of Shelburne*[1967] Ch 603, [1967] 1 All ER 888.

5 As to the limiting effect of the words 'management or administration' see *Municipal and General Securities Co Ltd v Lloyds Bank Ltd*[1950] Ch 212, [1949] 2 All ER 937.

6 In *Re Cockerell's Settlement Trusts, Cockerell v National Provincial Bank Ltd*[1956] Ch 372, [1956] 2 All ER 172, the court authorised the sale of a reversionary interest to avoid estate duty, no alteration of the trusts being required. In *Re Basden's Settlement Trusts, Basden v Basden*[1943] 2 All ER 11, it had been doubted

whether the court should assist in the avoidance of taxation. There is no doubt that the court now has power under the Variation of Trusts Act 1958 to sanction schemes the principal object of which is to save tax: see PARA 1062 note 8 post.

7 For the meaning of 'the court' see PARA 632 note 3 ante.

8 See *Re Pratt's Will Trusts, Barrow v McCarthy*[1943] Ch 326, [1943] 2 All ER 375; *Municipal and General Securities Co Ltd v Lloyds Bank Ltd*[1950] Ch 212, [1949] 2 All ER 937 (in both of these cases there was a power of sale vested in trustees and the Trustee Act 1925 s 57(1) was held not to apply).

9 The court's power is discretionary: see *Re Basden's Settlement Trusts, Basden v Basden*[1943] 2 All ER 11 (variation refused in a case where no protection of the interest of minors concerned was necessary).

10 Trustee Act 1925 s 57(1). See *Chapman v Chapman*[1954] AC 429, [1954] 1 All ER 798, HL (where Lord Morton agreed obiter with the comments on the Trustee Act 1925 s 57 contained in the majority judgment of the Court of Appeal at [1953] Ch 218, [1953] 1 All ER 103). The court may from time to time rescind or vary any order made under the Trustee Act 1925 s 57, or may make any new or further order: s 57(2). An application to the court may be made by the trustees, or any of them, or any person beneficially interested under the trust: s 57(3). In *Rennie v Proma Ltd and Byng*[1990] 1 EGLR 119 at 123, CA, it was observed that the Trustee Act 1925 s 57 was intended for the protection and benefit of persons who have claims under the trust, not persons who have claims against it. As to the procedure on application to the High Court see PARA 634 ante; and as to the jurisdiction of county courts and the procedure on application see PARAS 641-643 ante. The powers conferred by the Trustee Act 1925 are not in any way limited by the Variation of Trusts Act 1958 s 1 (as amended) (see PARA 1062 et seq post): s 1(6). The application will normally be made by the trustees and the interests of the beneficiaries will generally be considered collectively: see *Anker-Peterson v Anker-Peterson* [2000] WTLR 581 (Ch) (where the court allowed an application by a life tenant for the extension of investment and other powers stating that only exceptionally would such an application need to be made under the Variation of Trusts Act 1958). The Trustee Act 1925 s 57 does not apply to trustees of a settlement for the purposes of the Settled Land Act 1925: Trustee Act 1925 s 57(4). For the corresponding provision under the Settled Land Act 1925 see s 64 (as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 671-672. In certain circumstances the court has power in the exercise of its jurisdiction under the Trustee Act 1925 s 57 to authorise any expense of action taken or proposed by trustees of land in the management of land subject to a trust of land to be treated as a capital outgoing notwithstanding that in other circumstances that expense could not properly have been so treated: Settled Land and Trustee Acts (Court's General Powers) Act 1943 s 1(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 8). For the meaning of 'management' for this purpose, the circumstances in which the court may make an order, and the matters to which the court must have regard in determining whether to make an order see the Settled Land and Trustee Acts (Court's General Powers) Act 1943 s 1(2), (3), (5) (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 672. An order may be made notwithstanding that the action in question was taken, or the expense discharged, before the application for the order, and the court may direct such adjustments of accounts and such repayments to be made as appear to the court to be requisite for giving full effect to the purposes of the order: s 1(4).

11 *Re Mair, Richards v Doxat*[1935] Ch 562 at 565-566 per Farwell J. See, however, *Re Salting, Baillie-Hamilton v Morgan*[1932] 2 Ch 57 at 64-65 (where an order had been made authorising the trustees, in default of payment of certain premiums by the owner of a protected life interest, to pay the premiums out of income, and it was held that default by the tenant for life to pay the premiums would cause a forfeiture). As to protective trusts see PARAS 657 ante, 1063 note 7 post.

12 *Re Craven's Estate, Lloyds Bank Ltd v Cockburn (No 2)*[1937] Ch 431, [1937] 3 All ER 33 (where the court refused to sanction an advance to a tenant for life in order to enable him to become an underwriting member of Lloyd's). See also *Anker-Peterson v Anker-Peterson* [2000] WTLR 581 (Ch).

13 See eg *Re Salting, Baillie-Hamilton v Morgan*[1932] 2 Ch 57; *Re Mair, Richards v Doxat*[1935] Ch 562; *Re Forster's Settlement, Michelmores v Byatt*[1954] 3 All ER 714, [1954] 1 WLR 1450 (where, considering it expedient to do so in the circumstances, the court authorised the expenditure of capital to purchase the life tenant's interest).

14 See eg *Re Hope's Will Trusts, Hope v Thorp* [1929] 2 Ch 136 (sale of 'entailed' chattels which could not be sold under the Law of Property Act 1925 s 130(5) authorised); *Re Thomas, Thomas v Thompson*[1930] 1 Ch 194 (power to partition land conferred); *Re Beale's Settlement Trusts, Huggins v Beale*[1932] 2 Ch 15 (trustees for sale authorised to sell notwithstanding the refusal of a person whose consent was requisite to a sale to give that consent); *Re Harvey, Westminster Bank Ltd v Askwith*[1941] 3 All ER 284 (where there were wills in similar terms to provide a charitable home, and the trustees were authorised to blend the trust funds for that purpose).

15 See PARA 1011 ante.



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### **C. VARIATION UNDER THE VARIATION OF TRUSTS ACT 1958**

#### **1062. Jurisdiction of the court to vary trusts.**

Where property, whether real or personal, is held on trusts arising<sup>1</sup> under any will, settlement or other disposition, the court<sup>2</sup>, if it thinks fit, may by order approve<sup>3</sup> on behalf of any of certain persons<sup>4</sup> any arrangement<sup>5</sup> (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting to it) varying<sup>6</sup> or revoking all or any of the trusts<sup>7</sup>, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts<sup>8</sup>. The court's jurisdiction is not confined to settlements made in England or Wales<sup>9</sup>. It also has power under these provisions to vary the investment powers contained in a trust instrument<sup>10</sup>. Apart from one exception<sup>11</sup>, the court must not, however, approve an arrangement on behalf of any person unless the carrying out of that arrangement would be for the benefit<sup>12</sup> of that person<sup>13</sup>. The court is prepared to take, on behalf of those for whom its approval is sought, the kind of risk which an adult beneficiary of full capacity might well be prepared to take on his own behalf<sup>14</sup>. It will not approve an arrangement which is contrary to public policy<sup>15</sup>. The court may make an order even though there may be persons with potential interests in the estate who are not parties and who will not be bound by the order<sup>16</sup>.

These provisions do not apply to trusts affecting property settled by Act of Parliament<sup>17</sup>.

<sup>1</sup> The Variation of Trusts Act 1958 applies to trusts whether arising before or after the passing of that Act: s 1(1).

<sup>2</sup> The jurisdiction is generally exercisable by the High Court (see *ibid* s 1(3) (amended by the County Courts Act 1959 s 204, Sch 3; and the Mental Health Act 1983 s 148, Sch 4 para 14; and further amended as from 1 October 2007 by the Mental Capacity Act 2005 s 67(1), Sch 6 para 9(a)); and PARAS 632, 634 ante), or, where the fund subject or alleged to be subject to the trust does not exceed in amount or value the county court limit (see PARA 641 note 2 ante), by a county court (see the County Courts Act 1984 s 23(b); and PARA 641 ante). The power of the parties by agreement to confer jurisdiction on the county court under s 24 (as amended) (see PARA 641 note 4 ante) where the fund exceeds the county court limit does not apply to proceedings under the Variation of Trusts Act 1958 s 1 (as amended): County Courts Act 1984 s 24(3). As to jurisdiction where persons suffering from a mental disorder are concerned see PARA 1063 note 2 post.

<sup>3</sup> The variation results from an arrangement between the beneficiaries, of which the court order, approving and consenting on behalf of incapable beneficiaries, forms a part: see *Re Viscount Hambleden's Will Trusts*[1960] 1 All ER 353n, [1960] 1 WLR 82; *IRC v Holmden*[1968] AC 685 at 701, 710, 713, [1968] 1 All ER 148 at 151, 156-157, 159, HL; *Re Holt's Settlement, Wilson v Holt*[1969] 1 Ch 100 at 108-118, [1968] 1 All ER 470 at 472-476; *Re Ball's Settlement*[1968] 2 All ER 438 at 442-443, [1968] 1 WLR 899 at 905; *Spens v IRC*[1970] 3 All ER 295 at 300-301, [1970] 1 WLR 1173 at 1883-1884. The role of the court is not to stand in for the settlor. The court acts on behalf of the specified class and supplies consent for persons incapable of consenting: *Goulding v James*[1997] 2 All ER 239, CA, at 247 per Mummery J. In deciding whether to approve an arrangement, the court is not confined to inquiring into the effect of a proposed scheme on those on whose behalf approval is sought, but will regard the proposed arrangement as a whole in the light of the purpose of the trust as shown by the trust instrument and any other relevant evidence available: *Re Steed's Will Trusts, Sandford v Stevenson*[1960] Ch 407, [1960] 1 All ER 487, CA; *Re Burney's Settlement Trusts*[1961] 1 All ER 856, [1961] 1 WLR 545. See also *Re Lister's Will Trusts*[1962] 3 All ER 737, [1962] 1 WLR 1441; *Re Munro's Settlement Trusts*[1963] 1 All ER 209, [1963] 1 WLR 145; *Re Michelham's Will Trusts*[1964] Ch 550, [1963] 2 All ER 188. The court will not approve an arrangement merely in order to cover a defect in the trust instrument: see *Re Tinker's Settlement*[1960] 3 All ER 85n, [1960] 1 WLR 1011 (possible claim for rectification held to be very weak). In deciding whether to approve a proposed arrangement involving the creation of discretionary

trusts, the court may take into account indications of the manner in which they are intended to be exercised: see *Re Druce's Settlement Trusts*[1962] 1 All ER 563 at 567, [1962] 1 WLR 363 at 369 per Russell J (where the court approved an arrangement even though the approximation of the beneficial interest under the arrangement to those under the original trusts depended on the manner of exercise of discretionary powers conferred on trustees).

4 As to the persons on whose behalf orders may be made see PARA 1063 post.

5 'Arrangement' is used in the widest sense so as to cover any proposal which any person may put forward for varying or revoking the trusts: *Re Steed's Will Trusts*[1960] Ch 407 at 419, [1960] 1 All ER 487 at 492, CA, per Lord Evershed MR. See also *Re T's Settlement Trusts*[1964] Ch 158 at 162, sub nom *Re Towler's Settlement Trusts*[1963] 3 All ER 759 at 762 per Wilberforce J; *Re Ball's Settlement*[1968] 2 All ER 438 at 442, [1968] 1 WLR 899 at 905 per Megarry J.

6 One set of trusts may be replaced by another so long as the substratum of the original trusts remains: *Re Ball's Settlement*[1968] 2 All ER 438, [1968] 1 WLR 899.

7 Where a special power of appointment was exercised as a preliminary step to a proposed arrangement, with the genuine intention of benefiting the objects of the power, there was held to be no fraud on the power, even though an advantage might accrue to the appointor, and the arrangement was approved: *Re Robertson's Will Trusts*[1960] 3 All ER 146n, [1960] 1 WLR 1050. Cf *Re Brook's Settlement, Brook v Brook*[1968] 3 All ER 416, [1968] 1 WLR 1661. As to frauds on powers of appointment see POWERS vol 36(2) (Reissue) PARA 364 et seq. The court has jurisdiction to approve an arrangement revoking all the trusts of an English settlement in the event of the trust property becoming subject to the trusts of a settlement which would be recognised and enforced in some other jurisdiction: *Re Seale's Marriage Settlement*[1961] Ch 574, [1961] 3 All ER 136; *Re Windeatt's Will Trusts*[1969] 2 All ER 324, [1969] 1 WLR 692; *Re Chamberlain, Blanc v Blanc* (9 May 1976, unreported). See also Morcom 'Trust Exporting' (1976) 126 NLJ 1034.

8 See the Variation of Trusts Act 1958 s 1(1). The Variation of Trusts Act 1958 has been viewed as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier* (1841) 4 Beav 115 (see PARAS 749-750 ante): see *Goulding v James*[1997] 2 All ER 239 at 247, CA, per Mummery LJ. An arrangement has been approved under the Variation of Trusts Act 1958 which had previously been before the court when it was held that the court had not then jurisdiction: see *Re Chapman's Settlement Trusts (No 2)*[1959] 2 All ER 47n, [1959] 1 WLR 372; cf *Chapman v Chapman*[1954] AC 429, [1954] 1 All ER 798, HL. The power to vary trusts conferred by the Variation of Trusts Act 1958 may be exercised even though the main purpose or one of the purposes of the proposed arrangement is the reduction of tax payable: see *Re Chapman's Settlement Trusts (No 2)* supra; *Re Clitheroe's Settlement Trusts*[1959] 3 All ER 789, [1959] 1 WLR 1159; *Re Tinker's Settlement*[1960] 3 All ER 85n, [1960] 1 WLR 1011; *Re Druce's Settlement Trusts*[1962] 1 All ER 563, [1962] 1 WLR 363; *Re Holmden's Settlement Trusts, Holmden v IRC*[1966] Ch 511, [1966] 2 All ER 661, CA (affd sub nom *IRC v Holmden*[1968] AC 685, [1968] 1 All ER 148, HL); *Re Drewe's Settlement, Drewe v Westminster Bank Ltd*[1966] 2 All ER 844n, [1966] 1 WLR 1518; *Re Sainsbury's Settlement, Sainsbury v First CB Trustee Ltd*[1967] 1 All ER 878, [1967] 1 WLR 476; *Re Lloyd's Settlement, Lloyd v Leeper*[1967] 2 All ER 314n, [1967] 2 WLR 1078; but see *Re Weston's Settlements, Weston v Weston*[1969] 1 Ch 223, [1968] 1 All ER 720 (affd on different grounds [1969] 1 Ch 223, [1968] 3 All ER 338, CA). See also *Thomson v Thomson and Whitmee*[1954] P 384, [1954] 2 All ER 462. Although it is relevant for the court to consider the views of the trustees as to the proposed arrangement, whether they do or do not approve the arrangement is not conclusive: *Re Steed's Will Trusts*[1960] Ch 407, [1960] 1 All ER 487, CA. In the absence of bad faith or some other special circumstances showing grave misdirection of themselves on the part of the trustees, the court ought not to interfere with the exercise of a discretion entrusted to the trustees: *Re Steed's Will Trusts* supra. In many cases the intentions and wishes of the testator or settlor carry little, if any, weight: *Goulding v James* supra; *Re Weston's Settlements*[1969] 1 Ch 223, [1968] 3 All ER 338, CA; *Re Remnant's Settlement Trusts, Hooper v Wenham*[1970] Ch 560, [1970] 2 All ER 554, CA. The provisions contained in the Variation of Trusts Act 1958 s 1 (as amended) are not to be treated as limiting the powers conferred by the Settled Land Act 1925 s 64 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 671-672), the Trustee Act 1925 s 57 (see PARA 1061 ante), the powers of the authority having jurisdiction under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended) or, as from 1 October 2007, the powers of the Court of Protection (see MENTAL HEALTH vol 30(2) (Reissue) PARA 749 et seq): Variation of Trusts Act 1958 s 1(6) (amended as from 1 October 2007 by the Mental Capacity Act 2005 s 67(1), Sch 6 para 9(b)).

9 *Re Ker's Settlement Trusts*[1963] Ch 553, [1963] 1 All ER 801 (Northern Ireland settlement); *Re Paget's Settlement, Baillie v De Brossard*[1965] 1 All ER 58, [1965] 1 WLR 1046 (trust administered in the United States of America).

10 See PARA 1011 ante.

11 The exception relates to persons falling within the Variation of Trusts Act 1958 s 1(1)(d), ie persons with contingent discretionary interests under protective trusts where the interest of the protected principal beneficiary has not failed or determined (see PARA 1063 post): see s 1(1) proviso. Accordingly, the court need

not be satisfied that a proposed arrangement confers any benefit upon those persons; but this does not mean that their interests can be disregarded altogether: *Re Burney's Settlement Trusts*[1961] 1 All ER 856 at 858, [1961] 1 WLR 545 at 549 per Wilberforce J.

12 'Benefit' includes benefits of any kind including educational and social benefits: *Re Holt's Settlement, Wilson v Holt*[1969] 1 Ch 100, [1968] 1 All ER 470; *Re Weston's Settlements, Weston v Weston*[1969] 1 Ch 223, [1968] 3 All ER 338, CA (where the court refused to approve the discharge of trust property from an English trust and its transfer to Jersey on substantially the same terms); *Re CL*[1969] 1 Ch 587, [1968] 1 All ER 1104. See also *Re Remnant's Settlement Trusts, Hooper v Wenham*[1970] Ch 560, [1970] 2 All ER 554; cf *Re Tinker's Settlement*[1960] 3 All ER 85n, [1960] 1 WLR 1011. As to the determination of the question whether a proposed arrangement would be for the benefit of a person incapable of assenting to it by reason of mental disorder (or, as from 1 October 2007, lacking capacity to make a decision within the meaning of the Mental Capacity Act 2005 s 2) see PARA 1063 note 2 post.

13 Variation of Trusts Act 1958 s 1(1) proviso. This is the only fetter on the court's discretion in deciding whether or not to approve an arrangement: *Goulding v James*[1997] 2 All ER 239 at 249, CA. See *Re Clitheroe's Settlement Trusts*[1959] 3 All ER 789, [1959] 1 WLR 1159; *Re Bristol's Settled Estates, Bristol v Jermyn*[1964] 3 All ER 939, [1965] 1 WLR 469; *Re Cohen's Settlement Trusts, Eliot-Cohen v Cohen*[1965] 3 All ER 139, [1965] 1 WLR 1229.

14 *Re Cohen's Will Trusts, Re Cohen's Settlement Trusts*[1959] 3 All ER 523, [1959] 1 WLR 865; *Re Robinson's Settlement Trusts, Heard v Heard*[1976] 3 All ER 61, [1976] 1 WLR 806.

15 *Re Michelham's Will Trusts*[1964] Ch 550, [1963] 2 All ER 188.

16 *Re Suffert's Settlement, Suffert v Martyn-Linnington*[1961] Ch 1, [1960] 3 All ER 561; *Re Hall's Will Trusts, Hall v Mullan*[1985] NI 118.

17 Variation of Trusts Act 1958 s 1(5). The exclusion does not extend to property settled under the Administration of Estates Act 1925 on intestacy: see *S v T1* [2006] WTLR 1461 (Ch) (where the court varied the terms of the statutory trusts).

## UPDATE

### 1062 Jurisdiction of the court to vary trusts

NOTE 3--See *Wyndham v Egremont* [2009] EWHC 2076 (Ch), [2009] WTLR 1473, [2009] All ER (D) 64 (Aug).

NOTE 5--See also *Re RGST Settlement Trust; Ridgwell v Ridgwell*[2007] EWHC 2666 (Ch), [2008] STC 1883.

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### **1063. Persons on whose behalf the court may exercise jurisdiction.**

The persons on whose behalf the court may approve an arrangement<sup>1</sup> are:

- 280 (1) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting<sup>2</sup>; or
- 281 (2) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; but a person is not included for this purpose who would be of that description, or a member of that class, as the case may be, if the date had fallen or the event had happened at the date of the application to the court<sup>3</sup>; or
- 282 (3) any person unborn<sup>4</sup>; or
- 283 (4) any person<sup>5</sup> in respect of any discretionary interest<sup>6</sup> of his under protective trusts<sup>7</sup> where the interest of the principal beneficiary<sup>8</sup> has not failed or determined<sup>9</sup>.

<sup>1</sup> ie under the Variation of Trusts Act 1958 s 1(1): see PARA 1062 ante.

<sup>2</sup> Ibid s 1(1)(a). If a person is a patient within the meaning of the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively repealed) or as from 1 October 2007 lacks capacity to make a decision within the meaning of the Mental Capacity Act 2005 s 2 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 641), the question of whether the carrying out of any arrangement would be for his benefit is to be determined by the Court of Protection: Variation of Trusts Act 1958 s 1(3) (amended as from 1 October 2007 by the Mental Capacity Act 2005 s 67(1), Sch 6 para 9(a)). Cf para 1064 note 3 post. The costs of an application to determine whether an arrangement would be for the benefit of a patient or person lacking capacity have been held to be payable out of the trust estate: *Re Sanderson's Settlement Trusts* [1961] 1 All ER 25n, [1961] 1 WLR 36. It is for the benefit of the patient or person lacking capacity for the court to do what he would have done if of full capacity: *Re CL* [1969] 1 Ch 587, [1968] 1 All ER 1104.

<sup>3</sup> Variation of Trusts Act 1958 s 1(1)(b). As to who is included in the first part of s 1(1)(b) see *Knocker v Youle* [1986] 2 All ER 914, [1986] 1 WLR 934 (a person who has an actual interest under a trust, however remote, cannot properly fall within the definition of a person who 'may become entitled' to an interest). As to who is excluded under the second part see *Re Suffert's Settlement, Suffert v Martyn-Linnington* [1961] Ch 1, [1960] 3 All ER 561; *Re Moncrieff's Settlement Trusts* [1962] 3 All ER 838n, [1962] 1 WLR 1344. As to the date of the application to the court see *Re Suffert's Settlement, Suffert v Martyn-Linnington* supra at 5 and 563 per Buckley J (where it was held that a court order would not bind any potential statutory next of kin then in existence, but would bind any person not then in existence who might become entitled in the future on the applicant's death as then being one of her statutory next of kin); *Knocker v Youle* supra; but see Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 627.

<sup>4</sup> Variation of Trusts Act 1958 s 1(1)(c). See *Goulding v James* [1997] 2 All ER 239, CA.

<sup>5</sup> 'Any person' includes an unborn or unascertained person: *Re Turner's Will Trusts, Bridgman v Turner* [1960] Ch 122, [1959] 2 All ER 689.

<sup>6</sup> For these purposes, 'discretionary interest' means an interest arising under the trust specified in the Trustee Act 1925 s 33(1)(ii) (see SETTLEMENTS vol 42 (Reissue) PARA 917) or any like trust: Variation of Trusts Act 1958 s 1(2).

7 For these purposes, 'protective trusts' means the trusts specified in the Trustee Act 1925 s 33(1)(i), (ii) (see SETTLEMENTS vol 42 (Reissue) PARA 917) or any like trusts: Variation of Trusts Act 1958 s 1(2). 'Like' requires not identity but similarity, and similarity in substance suffices without the need of similarity in form or detail or wording: *Re Wallace's Settlements* [1968] 2 All ER 209, [1968] 1 WLR 711. For cases where protective trusts have been varied see *Re Poole's Settlements' Trusts*, *Poole v Poole* [1959] 2 All ER 340, [1959] 1 WLR 651; *Re Robertson's Will Trusts* [1960] 3 All ER 146n, [1960] 1 WLR 1050; *Re Burney's Settlement Trusts* [1961] 1 All ER 856, [1961] 1 WLR 545. Cf *Re Steed's Will Trusts* [1960] Ch 407, [1960] 1 All ER 487, CA (where in the particular circumstances the court refused to approve the enlargement of a protected life interest into an absolute interest).

8 For these purposes, 'the principal beneficiary' means any person for whose benefit income, including an annuity or other periodical income payment, is directed to be held on protective trusts: Trustee Act 1925 s 33(1); definition applied by the Variation of Trusts Act 1958 s 1(2).

9 Ibid s 1(1)(d).

## UPDATE

### 1063 Persons on whose behalf the court may exercise jurisdiction

NOTE 4--See *Wyndham v Egremont* [2009] EWHC 2076 (Ch), [2009] WTLR 1473, [2009] All ER (D) 64 (Aug).

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## **1064. Application to the court.**

An application to the High Court or a county court, where the county court has jurisdiction<sup>1</sup>, under the Variation of Trusts Act 1958<sup>2</sup> for the variation of the terms of a trust should ordinarily be begun by using the Part 8 procedure<sup>3</sup>.

Where the application is for the approval of an arrangement for the variation of beneficial interests, in general the beneficiaries, and not the trustees, should be the applicants, unless the trustees are satisfied that the proposed arrangement is beneficial to the beneficiaries and that no beneficiary is willing to make the application<sup>4</sup>.

<sup>1</sup> As to the jurisdiction of the county court see the County Courts Act 1984 s 23(b); and PARAS 641-643 ante.

<sup>2</sup> See under the Variation of Trusts Act 1958 s 1 (as amended); see PARAS 1062-1063 ante. Proceedings under s 1 (as amended) are assigned to the Chancery Division: see CPR 64.1(3); and PARA 634 ante.

<sup>3</sup> See CPR 64.3; and PARA 643 ante. As to an arrangement for the benefit of a patient within the meaning of the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively repealed) or, as from 1 October 2007, a person lacking capacity to make a decision within the meaning of the Mental Capacity Act 2005 s 2 see MENTAL HEALTH vol 30(2) (Reissue) PARAS 641, 722.

<sup>4</sup> See *Re Druce's Settlement Trusts* [1962] 1 All ER 563 at 568, [1962] 1 WLR 363 at 370-371.

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## 1065. Parties, evidence and hearing.

In a claim under the Variation of Trusts Act 1958 any person who created the trust<sup>1</sup> or provided property for the purposes of the trusts in question must, if still alive, be made a party to the claim<sup>2</sup>. The function of the trustees is that of watchdog for the unborn and unascertained<sup>3</sup>. All persons whose interests would be affected by the proposed arrangement should be joined even if they are members of a hypothetical class<sup>4</sup>.

The reasons for the claimant's request that the trusts be varied should be given in an affidavit<sup>5</sup>.

As a general rule applications under the Variation of Trusts Act 1958, and all applications under that Act or otherwise for the variation of investment clauses, should be heard in open court so as to secure uniformity of practice<sup>6</sup>, and all interests which it is sought to bind and on whose behalf the court's approval is asked should be represented by counsel<sup>7</sup>.

1 The intentions and wishes of the settlor do not have any special significance: see *Goulding v James* [1997] 2 All ER 239 at 251, CA, per Mummery LJ.

2 CPR 64.4(2). In such a claim: (1) all the trustees must be parties; (2) if the claim is being made by trustees, any of them who does not consent to being a claimant must be made a defendant; and (3) the claimant may make parties to the claim any persons with an interest in or claim against the estate, or an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought: CPR 64.4(1).

3 *Re Druce's Settlement Trusts* [1962] 1 All ER 563, [1962] 1 WLR 363; *Re Munro's Settlement Trusts* [1963] 1 All ER 209, [1963] 1 WLR 145; *Goulding v James* [1997] 2 All ER 239, CA. Beneficiaries who are minors need not be joined as parties if there is little likelihood of their attaining any interest under the trust and their interests can adequately be protected by the trustees: *Re Moncrieff's Settlement Trusts* [1962] 3 All ER 838n, [1962] 1 WLR 1344. If minors are joined as defendants, it is for their guardians (formerly known as guardians ad litem) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 319) to watch over their interests: *Re Whittall, Whittall v Faulkner* [1973] 3 All ER 35, [1973] 1 WLR 1027.

4 *Re Suffert's Settlement, Suffert v Martyn-Linnington* [1961] Ch 1, [1960] 3 All ER 561 (where persons who would be the next of kin of a living person if that person had died on the date of the issue of the originating summons were not joined and were held not to be bound by the court's order). See also *Re Clarke's Will Trusts* [1961] 3 All ER 1133, [1961] 1 WLR 1471 (where an order was made approving an arrangement on behalf of persons interested other than two defendants who were minors and who had not been served). Persons who could only have become interested by the exercise of a power of appointment which has been released need not be joined: *Re Christie-Miller's Settlement Trust, Westminster Bank Ltd v Christie-Miller* [1961] 1 All ER 855n, [1961] 1 WLR 462.

5 Claimants must state reasons: *Re Oakes' Settlement Trusts* [1959] 2 All ER 58, [1959] 1 WLR 502. Trustees and advisers should, before filing extrinsic evidence of a testator's or settlor's intentions, wishes and motives, consider its relevance and whether there is a risk that irrelevant and possibly inflammatory collateral issues will be raised thereby adding unnecessarily to costs: see *Goulding v James* [1997] 2 All ER 239 at 244-245 per curiam Mummery J. As to the evidence required where a personal covenant is offered in compensation for loss of a possible interest under discretionary trusts see *Re Clitheroe's Settlement Trusts* [1959] 3 All ER 789, [1959] 1 WLR 1159; and as to the evidence required on an application for the approval of a variation of investment powers see PARA 1011 ante. Where protective trusts were sought to be varied, it was held that evidence, including evidence of the financial position of the principal beneficiary and her spouse, must be provided to show to what extent the protective trusts continued to serve any useful purpose: *Re Baker's Settlement Trusts* [1964] 1 All ER 482n, [1964] 1 WLR 336n.

6 If there is a good reason, eg in order to avoid unnecessary publicity, an application may always be made for the matter to be heard in chambers: *Re Rouse's Will Trusts* [1959] 2 All ER 47n at 51, [1959] 1 WLR 372 at 374-375 per Vaisey J. See PARA 643 ante.

7 *Re Chapman's Settlement Trusts (No 2)* [1959] 2 All ER 47n at 49, [1959] 1 WLR 372 at 374; *Re Rouse's Will Trusts* [1959] 2 All ER 47n at 51, [1959] 1 WLR 372 at 374-375. See also *Re Byng's Will Trusts* [1959] 2 All ER 47n, [1959] 1 WLR 375. Where there is no conflict of interest, the trustees should represent those who are not able to be before the court: *Re Rouse's Will Trusts* supra at 51 and 374-375 per Vaisey J. A representation order in respect of unborn issue who might become beneficially interested was refused in *Re Byng's Will Trusts* supra. Persons who are not sui juris should in general be separately and exclusively represented by their own counsel as their interests may well not coincide with the interests of adult beneficiaries who can themselves consent to an arrangement: *Re Whigham's Settlement Trusts, Whigham v Johnston* [1971] 2 All ER 568n, [1971] 1 WLR 831n. Evidence must normally be before the court to show that the litigation friends or trustees support the arrangement as being for the benefit of the minor or unascertained beneficiaries and will generally be in the form of a written opinion: see Chancery Guide (2005) PARA 26.33.



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## **1066. Form and effect of order.**

An order made under the Variation of Trusts Act 1958 should be so expressed as to show that it was made under that Act, and normally takes the form of approving an arrangement set out in a schedule<sup>1</sup>. As the Act only empowers the court to give a binding consent to the arrangement on behalf of those unable to give it themselves, the variation is effected not by the court but by the consent of all parties<sup>2</sup>. The variation takes effect as soon as the court order is made without any further instrument<sup>3</sup>, and the order may be liable to stamp duty<sup>4</sup>. Where the original trust was declared by will or settlement, a note or memorandum of the order should be indorsed on the probate or settlement<sup>5</sup>.

1 See *Re Chapman's Settlement Trusts (No 2)* [1959] 2 All ER 47n at 49, [1959] 1 WLR 372 at 374; *Re Coates' Will Trusts* [1959] 2 All ER 47n at 54, [1959] 1 WLR 375 at 379; *Re Byng's Will Trusts* [1959] 2 All ER 47n at 57, [1959] 1 WLR 375 at 383; *Re Rouse's Will Trusts* [1959] 2 All ER 47n at 51, [1959] 1 WLR 372 at 374-375. For the forms appropriate where the Attorney General is a party and does not raise objection see *Re Longman's Settlement Trusts, Talbot v Longman* [1962] 2 All ER 193n, [1962] 1 WLR 455.

2 *Re Viscount Hambleden's Will Trusts* [1960] 1 All ER 353n, [1960] 1 WLR 82; *IRC v Holmden* [1968] AC 685 at 701, 710, 713, [1968] 1 All ER 148 at 151, 156-157, 159, HL; *Re Ball's Settlement* [1968] 2 All ER 438 at 442-443, [1968] 1 WLR 899 at 905; *Re Holt's Settlement, Wilson v Holt* [1969] 1 Ch 100, [1968] 1 All ER 470; *Spens v IRC* [1970] 3 All ER 295 at 300-301, [1970] 1 WLR 1173 at 1183-1184. The old trusts are replaced and the perpetuity period begins to run anew: *Re Holt's Settlement, Wilson v Holt* supra.

3 *Re Holt's Settlement, Wilson v Holt* [1969] 1 Ch 100, [1968] 1 All ER 470.

4 As to stamp duty see the Chancery Guide (2005) PARA 26.36 (the maximum duty on duplicate orders is 50p). See generally STAMP DUTIES AND STAMP DUTY RESERVE TAX.

5 *Re Rouse's Will Trusts* [1959] 2 All ER 47n at 51, [1959] 1 WLR 372 at 375; *Re Byng's Will Trusts* [1959] 2 All ER 47n at 57, [1959] 1 WLR 375 at 383.

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### **(iii) Administration and Enforcement of Trusts by the Court**

#### **A. THE JURISDICTION AND ITS EXERCISE**

#### **1067. Interference by the court in administration of trust.**

Under its inherent jurisdiction a court of equity<sup>1</sup> will interfere in the management and administration of a trust<sup>2</sup> where there is no trustee to carry it on<sup>3</sup>, or where the trustee wrongfully declines to act<sup>4</sup> or is acting improperly<sup>5</sup>, or where difficulties have arisen which cannot be removed without the assistance of the court<sup>6</sup>, or where the decision of the court on a doubtful question connected with the trust or on its proper administration is sought by the trustee<sup>7</sup> or by the beneficiary<sup>8</sup>. The court does not, however, interfere:

- 284 (1) to enforce the exercise of a power in a particular way by a trustee where he has been given an absolute discretion respecting it and he is not exercising that discretion wrongly or unreasonably<sup>9</sup>; or
- 285 (2) to control his action or discretion in any other way, unless he acts improperly<sup>10</sup>; or
- 286 (3) where the proceedings for obtaining administration by the court are vexatiously or unnecessarily instituted<sup>11</sup>.

1 As to the courts having jurisdiction in relation to trusts see PARAS 632 et seq ante, 1070 post.

2 As to the effect of administration by the court on the powers of a trustee see PARA 979 ante. As to the administration in court of a trust fund in which a foreign sovereign is interested see *Morgan v Larivière*(1875) LR 7 HL 423; *United States of America and Republic of France v Dollfus Mieg & Cie SA and Bank of England*[1952] AC 582 at 617-618, [1952] 1 All ER 572 at 588-589, HL; *Rahimtoola v Nizam of Hyderabad*[1958] AC 379, [1957] 3 All ER 441, HL.

3 See PARA 807 ante.

4 *Tempest v Lord Camoys*(1882) 21 ChD 571 at 579, CA, per Brett LJ, and at 580 per Cotton LJ. The court will compel a trustee to exercise in one way or another a discretion committed to him, where he declines to do so: *Lord Milsington v Earl of Mulgrave* (1818) 3 Madd 491; *Mortimer v Watts* (1852) 14 Beav 616; *Luther v Bianconi* (1860) 10 Ch R 194. A court may see to the execution of discretionary trusts by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear, by itself directing the trustees so to distribute: *McPhail v Doulton*[1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce.

5 *Tempest v Lord Camoys*(1882) 21 ChD 571, CA; *Re Earl of Radnor's Will Trusts*(1890) 45 ChD 402 at 405, CA, per Chitty J. As to an injunction against a trustee exercising his powers improperly see PARA 974 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 471.

6 *De Quetteville v De Quetteville, Re De Quetteville* (1903) 19 TLR 383, CA.

7 *Talbot v Earl of Radnor* (1834) 3 My & K 252; *Barker v Peile* (1865) 2 Drew & Sm 340; *Hurst v Hurst*(1874) 9 Ch App 762. See eg *Breadner v Granville-Grossman*[2001] Ch 523, [2000] 4 All ER 705 (where the trustees asked the court to determine for whom the trust fund was held). See also PARAS 1057 ante, 1075 post.

8 *Smallwood v Rutter* (1851) 9 Hare 24. See also PARAS 953 ante, 971 post.

9 *Gisborne v Gisborne*(1877) 2 App Cas 300, HL; *Tabor v Brooks*(1878) 10 ChD 273; *Marquis of Camden v Murray*(1880) 16 ChD 161; *Tempest v Lord Camoys*(1882) 21 ChD 571, CA; *Re Burrage, Burningham v Burrage* (1890) 62 LT 752; *Re Bryant, Bryant v Hickley*[1894] 1 Ch 324; *Re Brockbank, Ward v Bates*[1948] Ch 206, [1948] 1 All ER 287; *Re Whichelow, Bradshaw v Orpen*[1953] 2 All ER 1558, [1954] 1 WLR 5; *Edge v Pensions Ombudsman*[1998] Ch 512, [1998] 2 All ER 547 (affd [2000] Ch 602, [1999] 4 All ER 546, CA); and see *Turner v Turner*[1984] Ch 100, [1983] 2 All ER 745. 'Discretion' in honest plain language means 'do as you like': *Re Norrington, Brindley v Partridge*(1879) 13 ChD 654 at 659, CA, per Bacon V-C.

10 *Brophy v Bellamy*(1873) 8 Ch App 798; *Bethell v Abraham*(1873) LR 17 Eq 24; *Gisborne v Gisborne*(1877) 2 App Cas 300, HL; *Re Blake, Jones v Blake*(1885) 29 ChD 913, CA; *Re Bryant, Bryant v Hickley*[1894] 1 Ch 324; *Train v Clapperton*[1908] AC 342, HL; *Re Knolly's Trusts, Saunders v Haslam*[1912] 2 Ch 357, CA; *Re Charteris, Charteris v Biddulph*[1917] 2 Ch 379, CA; *Re Steed's Will Trusts, Sandford v Stevenson*[1960] Ch 407, [1960] 1 All ER 487, CA; but see *Re Hodges, Davey v Ward*(1878) 7 ChD 754; *Re Roper's Trusts*(1879) 11 ChD 272; *Klug v Klug*[1918] 2 Ch 67. See also *Re D'Epinoix's Settlement, D'Epinoix v Fettes*[1914] 1 Ch 890. As to the fiduciary obligations of a trustee who has a mere power vested in him see *Re Hay's Settlement Trusts*[1981] 3 All ER 786 at 792-793, [1982] 1 WLR 202 at 208-209. As to grounds on which the court will hold the exercise of a discretionary power to be invalid see PARAS 976-977 ante.

11 *Re Cabburn, Gage v Rutland* (1882) 46 LT 848. If a trustee institutes proceedings for administration when he might have paid the fund into court or adopted some other less costly procedure, he may be deprived of or ordered to pay the extra costs occasioned by the course which he has taken: *Wells v Malbon* (1862) 31 Beav 48.

## UPDATE

### 1067 Interference by the court in administration of trust

NOTE 6--See *Walbrook Trustees (Jersey) Ltd v Fatta*[2010] EWCA Civ 408, [2010] All ER (D) 122 (Apr).

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### **1068. Enforcement of duty.**

If a trustee wilfully refuses to do an act which it is his duty to do in his position of trustee, he can be compelled by a court of equity to do it<sup>1</sup>, and may be ordered to pay the costs of any legal proceedings rendered necessary by his refusal<sup>2</sup>. Alternatively, he may be removed and a new trustee appointed to carry out the duties attached to the trusteeship<sup>3</sup>.

1 *Lord Milsington v Earl of Mulgrave* (1818) 3 Madd 491; *Ouchterlony v Lord Lynedoch* (1830) 7 Bli NS 448, HL; *Mortimer v Watts* (1852) 14 Beav 616; *Re Burrage, Burningham v Burrage* (1890) 62 LT 752 at 753 per Chitty J. If, however, under the terms of the trust, the trustee has a discretion as to the time or manner of doing the act, the court does not interfere with the exercise in good faith of that discretion: *Tempest v Lord Camoys* (1882) 21 ChD 571, CA; *Re Burrage, Burningham v Burrage* supra. As to injunctions to restrain breaches of trust see CIVIL PROCEDURE vol 11 (2009) PARA 471.

2 *Jones v Lewis* (1786) 1 Cox Eq Cas 199; *Southwell v Martin* (1869) 21 LT 135; *Re Chapman, Freeman v Parker* (1894) 72 LT 66, CA; *Bowen-Jones v Bowen-Jones* [1986] 3 All ER 163, [1986] NLJ Rep 894. See also PARA 1110 post.

3 See *McPhail v Doulton* [1971] AC 424 at 457, [1970] 2 All ER 228 at 247, HL, per Lord Wilberforce.

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### **1069. Order for payment into court.**

Where it is necessary or expedient for the preservation of the trust estate or the due performance of the trust, the court may order the trust fund to be paid into court<sup>1</sup>.

<sup>1</sup> *Freeman v Fairlie* (1812) 3 Mer 29; *Whitmarsh v Robertson* (1840) 4 Beav 26; *Bartlett v Bartlett* (1845) 4 Hare 631; *Ross v Ross* (1849) 12 Beav 89; *Wilton v Hill* (1852) 2 De GM & G 807; *Marryat v Marryat* (1854) 23 LJ Ch 876; *Hamond v Walker* (1857) 3 Jur NS 686; *Whitmore v Turquand* (1860) 1 John & H 296; *Talbot v Marshfield* (1864) 2 Drew & Sm 285; *Symonds v Jenkins* (1876) 34 LT 277; *Porrett v White* (1885) 31 ChD 52, CA (but see *Re Wright*, *Kirke v North* [1895] 2 Ch 747); *Re Carr's Trusts*, *Carr v Carr* [1904] 1 Ch 792, CA. Cf EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 732, 734. A trust fund may be ordered to be paid into court even though some of the persons interested in the money are not before the court: *Wilton v Hill* supra. A trust fund lent under a power in the instrument of trust was ordered to be paid into court on the representation of the trustees that it was in danger: *Payne v Collier* (1790) 1 Ves 170; and see *Foster v Hewitt* (1837) 1 Jur 839. The existence of a discretionary power in the trustee is not a bar to an order for the payment of the trust fund into court, but the circumstance that such a power is on the point of being exercised may cause the court to refrain from directing that payment: *Talbot v Marshfield* supra. As to payment into court by trustees, the court's power to order payment in where the majority of the trustees are desirous of paying in but the concurrence of others cannot be obtained, and the procedure relating to payment into court see PARA 917 et seq ante.

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### **1070. Power to obtain court's intervention.**

Any trustee or beneficiary has a right to seek or require the intervention of the court<sup>1</sup>, but, if the proceedings are unnecessary, the trustee<sup>2</sup> or beneficiary may be refused his costs, or may be condemned to pay the costs of the proceedings<sup>3</sup>. By appropriate language, the creator of the trust may restrain a beneficiary from instituting vexatious proceedings, on pain of forfeiting his interest in the trust property<sup>4</sup>.

1 As to the right to apply to the court for directions see PARA 1057 ante. As to grounds on which the court will hold the exercise of a discretionary power to be invalid see PARAS 976-977 ante. A beneficiary interested in remainder in part of a trust fund may institute proceedings for administering the trust and require the fund to be brought into court: *Bartlett v Bartlett* (1845) 4 Hare 631; *Governesses' Benevolent Institution v Rusbridger* (1854) 18 Beav 467. A person claiming adversely to a trust cannot be made a party to a suit for its execution: *A-G v Avon (or Aberavon) Corp'n* (1863) 3 De GJ & Sm 637, CA.

2 As to the liability of a trustee for the costs of unnecessary proceedings see PARA 910 ante.

3 As to the costs of administration proceedings see further PARAS 910 note 2, 911 ante.

4 *Adams v Adams* [1892] 1 Ch 369, CA; *Re Allan, Havelock v Havelock-Allan* (1896) 12 TLR 299; cf *Powell v Morgan* (1688) 2 Vern 90; *Rhodes v Muswell Hill Land Co* (1861) 29 Beav 560; *Re Williams, Williams v Williams* [1912] 1 Ch 399; *Nathan v Leonard* [2002] EWHC 1701 (Ch), [2003] 4 All ER 198, [2003] 1 WLR 827. The court's jurisdiction on matters of law, as opposed to matters of fact, cannot be ousted: *Re Wynn, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341. See also *Re Coxen, McCallum v Coxen* [1948] Ch 747, [1948] 2 All ER 492; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL; *Re Jones, Midland Bank Executor and Trustee Co Ltd v Jones* [1953] Ch 125, [1953] 1 All ER 357; *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA.

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### **1071. Right of beneficiaries to seek information from a third party.**

Exceptionally, the court can order a defendant, who is not otherwise an appropriate party to proceedings, to identify the name and address of a third party<sup>1</sup>.

<sup>1</sup> This has been referred to as 'the discovery jurisdiction': *Re Murphy's Settlements, Murphy v Murphy* [1998] 3 All ER 1 at 9, sub nom *Murphy v Murphy* [1999] 1 WLR 282 at 289 per Neuberger J. There are two situations where a third party can be required to give information:

- 14 (1) where, through no fault of his own, he gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he incurs no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers; justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration (*Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 at 175, [1973] 2 All ER 943 at 948, HL, per Lord Reid; extended in *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309 to enable a claimant to obtain discovery to see whether a tort had been committed);
- 15 (2) under the court's equitable jurisdiction to ascertain the whereabouts of a missing trust fund (*A v C* [1981] QB 956n, [1980] 2 All ER 347; extended in *Re Murphy's Settlements* supra to proceedings brought by a potential beneficiary under a discretionary trust (the court ordered the settlor (who had reserved the power of appointment of trustees) to give the plaintiff information as to the names and addresses of the trustees of the settlement, subject to the settlor being given an opportunity to put in evidence as to the inconvenience, cost or other problem the order would cause; the order was extended to similar information in relation to a settlement made by the settlor's wife (now deceased) where the settlor did not have a power of appointment of trustees)).

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### **1072. Effect on absent parties.**

Absent parties are bound by proceedings in connection with the administration of a trust where they are served with notice of the judgment or order, or an order is made appointing a party to the proceedings to represent them<sup>1</sup>.

<sup>1</sup> *May v Newton* (1887) 34 ChD 347. The court has power to order that a judgment or order be served on a person who is not a party to the action but may be affected by it: see CPR 19.8A(1). The person served with notice will be bound as if he had been a party but may within 28 days of service on him apply to set aside or vary the judgment or order and take part in proceedings: CPR 19.8A(8). See also PARA 1077 post.



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### **1073. Appointment of receiver.**

Where a trustee refuses to act, a receiver of the trust property is appointed if all the acting trustees and beneficiaries consent to the appointment, but not otherwise<sup>1</sup>. He is also appointed on the application of any beneficiary, if the appointment is required for the safety of the trust property or the due administration of the trust, but not otherwise<sup>2</sup>.

<sup>1</sup> A power to appoint new trustees in place of the refusing trustee may be available under the Trustee Act 1925 s 36 (as amended): see PARA 836 ante.

<sup>2</sup> As to the appointment of a trustee as receiver see RECEIVERS vol 39(2) (Reissue) PARA 334; as to remuneration of receivers see RECEIVERS vol 39(2) (Reissue) PARA 436 et seq; and as to discharge of receivers see RECEIVERS vol 39(2) (Reissue) PARA 463 et seq.

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## **B. PROCEDURE IN ADMINISTRATION ACTIONS**

### **1074. Procedure for obtaining intervention of the court.**

The intervention of the court under its inherent jurisdiction<sup>1</sup> is obtained by the issue of a claim form<sup>2</sup> or, in suitable cases, on application using the Part 8 procedure<sup>3</sup>.

<sup>1</sup> See PARA 1067 ante. As to the procedure on an application for an order of the High Court under the Trustee Act 1925 or under the Variation of Trusts Act 1958 see CPR Pt 64; and *Practice Direction-Estates, Trusts and Charities PD 64*; *Practice Direction-Applications to the Court for Directions by Trustees in relation to the Administration of the Trust PD 64b*. All the trustees must be parties; if the claim is made by trustees any of them who does not consent to being a claimant must be joined as a defendant; the claimant may join any persons with an interest under the trust who it is appropriate to join: see CPR 64.4(1). For additional requirements in claims under the Variation of Trusts Act 1958 see PARA 1065 ante. As to the procedure for the lodgment of money in court by trustees see PARA 920 ante.

<sup>2</sup> See under CPR Pt 7. See *Borthwick v Ransford*(1884) 28 ChD 79. In proceedings against trustees for wilful default (ie for omitting to do what a prudent business man would have done), accounts will be directed against them on that footing on proof of a single instance of wilful default and at any stage of the proceedings: *Shepherd v Towgood* (1823) Turn & R 379; *Garrett v Noble* (1834) 6 Sim 504; *Green v Badley* (1844) 7 Beav 274; *Coope v Carter*, *Coope v Townsend* (1852) 2 De GM & G 292; *Blakely v Blakely* (1855) 1 Jur NS 368; *Vernon v Wright* (1858) 7 HL Cas 35; *Massey v Massey* (1862) 2 John & H 728; *Coppard v Allen* (1864) 2 De GJ & Sm 173; *Cary v Knowles* (1868) 19 LT 482; *Nash v Howell* (1869) 21 LT 743; *Job v Job*(1877) 6 ChD 562 (where no wilful default was proved); *Re Symons, Luke v Tonkin*(1882) 21 ChD 757; *Re Armitage, Smith v Armitage*(1883) 24 ChD 727; *Re Brier, Brier v Evison*(1884) 26 ChD 238, CA; *Re Anstice, Anstice v Hibbell* (1885) 54 LJ Ch 1104; *Re Barclay, Barclay v Andrew*[1899] 1 Ch 674. This rule does not, however, apply to cases of active breach of trust, in which remedies are only given in respect of those specific breaches of trust which are alleged and proved: *Re Wrightson, Wrightson v Cooke*[1908] 1 Ch 789. Accounts on the footing of wilful default formerly had to be obtained on writ: see *Dowse v Gorton*[1891] AC 190 at 202, HL, per Lord Macnaghten; *Re Newland, Bush v Summers* [1904] WN 181. As to allegations of wilful default and proceedings by beneficiaries alleging breach of trust or default see *Re Sir Lindsay Parkinson & Co Ltd's Trusts Deed, Bishop v Smith*[1965] 1 All ER 609n, [1965] 1 WLR 372. As to the remedy of account and the nature of an account on the footing of wilful default see EQUITY vol 16(2) (Reissue) PARA 449 et seq; as to accounts and inquiries in proceedings for the administration of a deceased person's estate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 724 et seq; and as to taking executorship and trusteeship accounts separately see *Armitage v Elworthy*(1879) 13 ChD 91, CA.

<sup>3</sup> The Part 8 procedure is used in cases where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: see CPR 8.1(2)(a); and PARA 643 ante. See also CPR Pt 64.2 (determination by the court of specified questions and matters); and PARA 635 ante.

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### **1075. Application for administration of trust.**

The trustees under any deed or instrument or any of them and any person claiming to be interested in the relief sought as beneficiary, or by assignment or otherwise under a beneficiary, under the trusts of any deed or instrument may apply<sup>1</sup> in the High Court for the execution of the trust under the court's direction<sup>2</sup>.

The court will only make an administration order if it considers that the issues between the parties cannot properly be resolved in any other way<sup>3</sup>. Where an order is made for the sale of any property vested in trustees, those trustees are to have the conduct of the sale unless the court otherwise directs<sup>4</sup>.

1    le using the Part 8 procedure: see CPR Pt 8; and PARA 643 ante. See also PARA 636 ante.

2    All causes and matters relating to the execution of trusts are assigned to the Chancery Division: see the Supreme Court Act 1981 s 61(1), Sch 1 para 1(c); and PARA 632 ante. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed. As to the jurisdiction of county courts in trust matters see PARAS 641-643 ante; as to the persons to be made parties to the proceedings see PARA 637 ante; and as to costs see PARA 906 et seq ante.

3    *Practice Direction-Estates, Trusts and Charities* PD 64 para 3.1. As to proceedings for the determination of certain questions or for certain forms of relief without execution of the trust under the court's direction see PARA 635 ante. Where an administration claim is brought by a person claiming to be beneficially entitled under the trust, and the claimant alleges that no or insufficient accounts have been furnished by the trustees, then, without prejudice to its other powers, the court may order that the proceedings be stayed for a specified period and that the trustees within that period furnish the claimant with proper accounts: see *Practice Direction-Estates, Trusts and Charities* PD 64 para 3.2. As to orders in proceedings for the administration of the estate of a deceased person see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 705 et seq.

4    *Practice Direction-Estates, Trusts and Charities* PD 64 para 3.4.

### **UPDATE**

### **1075 Application for administration of trust**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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### **1076. Inappropriate use of court procedure.**

Where it appears to a court officer<sup>1</sup> that a claimant is using the Part 8 procedure<sup>2</sup> inappropriately, he may refer the claim to a judge for the judge to consider the point<sup>3</sup>. The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure<sup>4</sup>.

1    le a member of the court staff: CPR 2.3.

2    See CPR Pt 8; and PARA 643 ante.

3    *Practice Direction-Alternative Procedure for Claims* PD 8 para 1.5.

4    *Practice Direction-Alternative Procedure for Claims* PD 8 para 1.6.

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### **1077. Proceedings against trustee in his absence.**

Where in any claim the court<sup>1</sup> is satisfied that a diligent search has been made for any person who, in the character of a trustee, is made a defendant in order to serve him with a process of the court and that he cannot be found, the court may hear and determine the claim and give judgment against him in his character of a trustee as if he had been duly served, or had acknowledged service in the claim, and had also appeared by his counsel and solicitor<sup>2</sup> at the hearing, but without prejudice to any interest he may have in the matters in question in the claim in any other character<sup>3</sup>.

1 For the meaning of 'the court' see PARA 632 note 3 ante.

2 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 Trustee Act 1925 s 59.

#### **UPDATE**

### **1077 Proceedings against trustee in his absence**

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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### **1078. Representative of deceased trustee as party.**

Where a beneficiary institutes proceedings against a surviving trustee for a general account and administration of the trust, the representative of a deceased trustee is not generally a necessary party<sup>1</sup>. Where all the trustees are dead, proceedings for breach of trust and the recovery of trust property may not be brought against the representatives of one who was not the last surviving trustee, unless the trust estate is represented by adding as co-defendants either the representatives of the last surviving trustee, or new trustees after they have been duly appointed<sup>2</sup>.

1 *London Gas Light Co v Spottiswoode* (1851) 14 Beav 264; *Moore v Morris* (1871) LR 13 Eq 139; *Re Harrison, Smith v Allen* [1891] 2 Ch 349. He may, however, be added as a defendant if there is good reason for that being done: *A-G v Newbury Corp* (1838) Coop Pr Cas 72 at 77-78; *Coppard v Allen* (1864) 2 De GJ & Sm 173; *Re Harrison, Smith v Allen* supra at 352 et seq per Chitty J.

2 *Re Jordan, Hayward v Hamilton* [1904] 1 Ch 260.

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### **1079. Representation of conflicting interests.**

As a general rule, a trustee who has had no beneficial interest and an interested beneficiary should not be represented at the hearing of the case by the same counsel<sup>1</sup>. Where one of several trustees is also a beneficiary, he should appear separately from the other trustees<sup>2</sup>.

<sup>1</sup> *Re Burton, Danby v Burton* [1901] WN 202.

<sup>2</sup> *Re Richards, Uglow v Richards* (1901), as reported in 50 WR 90 at 91; *Re Morgan, Brown v Jones* [1927] WN 180.

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## **(4) RIGHTS AND LIABILITIES IN RELATION TO THIRD PARTIES**

### **1080. Circumstances in which a trustee is personally liable.**

A trustee is personally liable on the contracts into which he enters, unless he excludes personal liability by express stipulation, and the knowledge of those who deal with him that he is contracting in his capacity as trustee is immaterial<sup>1</sup>. An express statement that liability is limited is needed to avoid exposure to personal risk<sup>2</sup>. Accordingly, where a trustee trades or otherwise deals with trust property, he is deemed, as against all persons other than the beneficiaries, to do so on his own account<sup>3</sup>, and is consequently personally liable for all debts incurred in the course of the trade or dealing<sup>4</sup> and may be made bankrupt in respect of it<sup>5</sup>. If a trustee holds shares in a company, he has the same liabilities in respect of them as if he were the beneficial owner, even though the fact of the trusteeship is noted in the company's books, but he is entitled to indemnity<sup>6</sup>. A trustee may be liable in tort in certain cases<sup>7</sup>. A trustee who invests in property will be liable as owner under the various provisions regulating land ownership<sup>8</sup>. However, a trustee has a lien over the trust fund for his proper costs and expenses and these extend to an indemnity against future liabilities<sup>9</sup>.

Trustees may commit criminal offences if they become involved in money laundering<sup>10</sup>. Trustees who acquire information in the course of carrying on a business in the regulated sector<sup>11</sup> which results in knowledge or suspicion that another person is engaged in money laundering or which gives reasonable grounds for knowledge or suspicion may commit an offence<sup>12</sup> if they fail to disclose that information<sup>13</sup>.

1 *Lumsden v Buchanan* (1865) 4 Macq 950 at 955, HL, per Lord Westbury LC; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 355, HL, per Lord Cairns LC, and at 368 per Lord Penzance. See also *Watling v Lewis* [1911] 1 Ch 414; *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch 717 at 728-729, CA, per Buckley LJ.

2 *Williams v Hathaway* (1877) 6 ChD 544. However, a proviso which is so wide as to avoid all liability may not be upheld: see *Watling v Lewis* [1911] 1 Ch 414.

3 *Re Hodson, ex p Richardson* (1818) 3 Madd 138 at 157 per Leach V-C; *Cutbush v Cutbush* (1839) 1 Beav 184 at 187 per Lord Langdale MR; *Lumsden v Buchanan* (1865) 4 Macq 950 at 955, HL, per Lord Westbury LC; *Re Leeds Banking Co, Fearnside and Dean's Case, Dobson's Case* (1866) 1 Ch App 231.

4 *Re Ballam, ex p Garland* (1804) 10 Ves 110 at 118-119 per Lord Eldon LC; *Owen v Delamere* (1872) LR 15 Eq 134 at 138-139 per Bacon V-C; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 368, HL, per Lord Penzance; *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548 at 552-553 per Jessel MR; *Marston Thompson Evershed plc v Bend* (unreported, but noted (1997) 39 LS Gaz R 38) (defendants held personally liable on loan agreement although it expressly described them as trustees); *Perring v Draper* [1997] EGCS 109. As to the power of an executor to carry on his testator's business see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 454 et seq. A trustee has a lien on the trust property for expenses properly incurred in administering the trust, and a third person may be subrogated to this right: see *Stott v Milne* (1884) 25 ChD 710, CA; *Dowse v Gorton* [1891] AC 190; *Re Frith, Newton v Rolfe* [1902] 1 Ch 342; and PARA 904 ante.

5 *Re Ballam, ex p Garland* (1804) 10 Ves 110 at 119; *Re Johnson, Shearman v Robinson* (1880) 15 ChD 548 at 552.

6 See PARA 904 ante; and COMPANIES vol 14 (2009) PARA 343; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 712.



7 Eg where a trustee is an occupier of premises and under a duty of care to persons who enter upon the premises: see NEGLIGENCE vol 78 (2010) PARA 29 et seq.

8 See eg the Environmental Protection Act 1990 (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH); the Gas Safety (Installations and Use) Regulations 1998, SI 1998/2451 (as amended) (see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 911 et seq); and the Control of Asbestos at Work Regulations 2002, SI 2002/2675 (see HEALTH AND SAFETY AT WORK).

9 *X v A*[2000] 1 All ER 490, [2000] 1 EGLR 19.

10 See the Proceeds of Crime Act 2002 s 327 (as amended) (concealing criminal property); s 328 (as amended) (becoming concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by another); s 329 (as amended) (acquisition, use and possession of criminal property); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARAS 791-793.

11 A business is in the regulated sector to the extent that it engages in the provision by way of business of services in relation to the formation, operation or management of a company or trust: see *ibid* s 330(12)(a), Sch 9 para 1(1)(m); CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 797.

12 See *ibid* s 330 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 797.

13 To a nominated officer or person authorised by the Director General of the Serious Organised Crimes Agency: see *ibid* s 330(4) (as substituted); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 797.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(4) RIGHTS AND LIABILITIES IN RELATION TO THIRD PARTIES/1081. Institution and defence of proceedings.

### 1081. Institution and defence of proceedings.

A claim may be brought by or against trustees<sup>1</sup> in that capacity without adding the beneficiaries as parties<sup>2</sup>. Unless the court otherwise directs, any judgment or order given in a claim in which the trustees represent the beneficiaries will bind the beneficiaries<sup>3</sup>.

In some cases, however, the beneficiaries should be made parties<sup>4</sup>; and the court may at any stage of the proceedings order any of the beneficiaries to be made parties, either in addition to or in lieu of the previously existing parties<sup>5</sup>.

Where a trustee brings proceedings to enforce his legal right as against a third person, a defence which is valid against him generally bars the equitable right of his beneficiary<sup>6</sup>.

1 As to compromise in proceedings concerning trust property see CPR 19.7(5), (6).

2 CPR 19.7A. See *White v Morris* (1852) 11 CB 1015; *Robertson v Wait* (1853) 8 Exch 299; *Stace v Gage* (1878) 8 ChD 451; *Simpson v Denny* (1878) 10 ChD 28; *Lloyd's v Harper* (1880) 16 ChD 290 at 315, 317, CA; *Jennings v Jordan* (1881) 6 App Cas 698, HL; *Re Brown's Will* (1884) 27 ChD 179; *Mellor v Daintree* (1886) 33 ChD 198 at 205; *Re Bowden, Andrew v Cooper* (1890) 45 ChD 444; *Barker v Furlong* [1891] 2 Ch 172; *Re Hodge's Settled Estates* [1895] WN 69; *Merry v Pownall* [1898] 1 Ch 306; and CIVIL PROCEDURE. A covenant by a person 'as trustee' does not render the trust estate liable; it is a covenant by himself and the addition of the proviso 'but not so as to create any personal liability' is repugnant and void: *Watling v Lewis* [1911] 1 Ch 414 at 423 per Warrington J; *Shep Touch* 273; and see PARA 1080 ante. See also *Furnivall v Coombes* (1843) 5 Man & G 736; *Farhall v Farhall* (1871) 7 Ch App 123; *Re Tewkesbury Gas Co, Tysoe v Tewkesbury Gas Co* [1911] 2 Ch 279 at 285 per Parker J; cf *Williams v Hathaway* (1877) 6 ChD 544; *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, HL; *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch 717 at 729, CA, per Buckley LJ. A person claiming adversely to a trust should not be made a party to a claim for its execution: *A-G v Avon (or Aberavon) Corpn* (1863) 3 De GJ & Sm 637. As between the trustee and the third persons the costs of litigation are not affected by the existence of the trust, but follow the ordinary rules: *Brodie v St Paul* (1791) 1 Ves 326; *Edwards v Harvey* (1809) Coop G 39. Trustees suing on behalf of their beneficiaries are not required to give security for costs, as nominal claimants: see *White v Butt* [1909] 1 KB 50, CA; and CIVIL PROCEDURE. In certain cases beneficiaries, although not required to be parties, may not be improper parties: *Merry v Pownall* supra at 312 per Kekewich J. Where beneficiaries should not have been parties to a claim, their costs are not allowed: *Re Cooper, Cooper v Vesey* (1882) 20 ChD 611, CA. As to the parties to an application for the appointment of new trustees see *Practice Note* [1901] WN 85; and as to the duty of trustees with reference to instituting and defending actions and their power to compromise see PARAS 960, 1052 ante. A trustee who has transferred trust property in breach of trust as against the beneficiary is not thereby precluded from enforcing obligations that arose between the trustee and the third party transferee of that property: *Montrose Investment Ltd v Orion Nominees Ltd* [2004] EWCA Civ 1032, 7 ITELR 255.

3 CPR 19.7(1). Such an order may only be enforced by or against a person who is not a party to the claim with the permission of the court: CPR 19.7(2).

4 *Re Smith, ex p London and North Western Rly Co and Midland Rly Co* (1888) 40 ChD 386, CA; *Re Piggin, ex p Mansfield Rly Co* [1913] 2 Ch 326.

5 CPR 19.2. See *Gas Light and Coke Co v Towse* (1887) 35 ChD 519 at 526.

6 *Gibson v Winter* (1833) 5 B & Ad 96; *Evans v Edmonds* (1853) 13 CB 777. As to the possibility that the right of beneficiaries to recover money may subsist even though their trustee's right is barred see PARA 1083 note 1 post; and as to the saving of the estate of trustees in land from extinction by lapse of time so long as a beneficiary has a right of action to recover the land see LIMITATION PERIODS vol 68 (2008) PARA 1140 et seq. Where a person by fraud obtains a deed by which another covenants to pay him an annual sum of money in trust for a third person, the fraud is a defence to a claim on the covenant, even though the beneficiary is shown not to have been privy to it: *Evans v Edmonds* supra. A defence which would be good against a claim by a beneficiary

is not, however, necessarily available against a claim by his trustees (*Britten v Perrott* (1834) 2 Cr & M 597; *May v Taylor* (1843) 6 Man & G 261; *Re Hayward, Tweedie v Hayward* [1901] 1 Ch 221) unless the beneficiary is absolutely entitled to the whole of the trust property (*May v Taylor* supra at 264-265). As to set-off as between trustees and debtors to the trust estate see PARA 924 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(4) RIGHTS AND LIABILITIES IN RELATION TO THIRD PARTIES/1082. Procedure where trustees do not take proceedings.

## 1082. Procedure where trustees do not take proceedings.

If one of several trustees refuses to join as claimant in a proper claim or has a special interest which precludes him from doing so, he should be made a co-defendant<sup>1</sup>. If no trustee is willing to institute a proper claim, the beneficiary may take proceedings for the administration of the trust by the court and obtain an order for liberty to use the trustee's name, or for a receiver who will use the trustee's name, in the institution of a proper claim<sup>2</sup>. Where the trustees are bare trustees<sup>3</sup> or there is alleged to be fraud or collusion between the trustees and the third person, or where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue<sup>4</sup> or where it is clear that liberty to use the trustees' names would be granted if sought<sup>5</sup>, then a beneficiary may himself bring the claim<sup>6</sup>, adding as defendants every trustee<sup>7</sup> and every other beneficiary<sup>8</sup> unless the trustees will allow their names to be used as claimants on receiving a proper indemnity<sup>9</sup>.

1 *Adams v Paynter* (1844) 1 Coll 530 at 534; *Luke v South Kensington Hotel Co* (1879) 11 ChD 121 at 126, CA, per Jessel MR.

2 *Doe d Prosser v King* (1834) 2 Dowl 580; *Davies v Davies* (1837) 2 Keen 534; *Fletcher v Fletcher* (1844) 4 Hare 67 at 78 per Wigram V-C; *Travis v Milne, Milne v Milne* (1851) 9 Hare 141 at 149-150 per Turner V-C; *Stainton v Carron Co* (1854) 18 Beav 146; *Jerdein v Bright* (1861) 2 John & H 325 at 332; *Touche v Metropolitan Railway Warehousing Co* (1871) 6 Ch App 671 at 677 per Lord Hatherley LC; *Yeatman v Yeatman* (1877) 7 ChD 210; *Meldrum v Scorer* (1887) 56 LT 471 at 473 per Kay J.

3 As to bare trustees see PARAS 755-756 ante.

4 *Field v Firmenich & Co* [1971] 1 All ER 1104, sub nom *Re Field, Field v Firmenich & Co* [1971] 1 WLR 555.

5 *Harmer v Armstrong* [1934] Ch 65, CA. See also *Yeatman v Yeatman* (1877) 7 ChD 210.

6 *Davies v Davies* (1837) 2 Keen 534; *Lancaster v Evors* (1841) 4 Beav 158 (refusal by trustee to sue); *Consett v Bell* (1842) 1 Y & C Ch Cas 569; *Travis v Milne, Milne v Milne* (1851) 9 Hare 141 at 149-150; *Stainton v Carron Co* (1854) 18 Beav 146 at 157; *Hilliard v Eiffe* (1874) LR 7 HL 39 at 43n (2); *Gandy v Gandy* (1885) 30 ChD 57 at 73 et seq, CA; *Beningfield v Baxter* (1886) 12 App Cas 167 at 178-179, PC; *Meldrum v Scorer* (1887) 56 LT 471 at 473; *Hayim v Citibank NA* [1987] AC 730, [1987] 3 WLR 83, PC (where it was observed that a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner); *Fraser v Canterbury Diocesan Board of Finance* [2001] Ch 669, [2001] 2 WLR 1103. See also *Bradstock Trustee Services Ltd v Nabarro Nathanson (a firm)* [1995] 4 All ER 888, [1995] 1 WLR 1405 (where the court refused to allow beneficiaries to be substituted for the trustees).

7 *Harrison v Pryse* (1740) Barn Ch 324; *Howden v Yorkshire Miners' Association* [1903] 1 KB 308 at 341, 345, CA.

8 *Meldrum v Scorer* (1887) 56 LT 471 at 474. If there is any dispute between the beneficiaries as to whether rights should be enforced or as to the method of enforcement, then, until this is resolved, the claim to enforce the rights should not proceed: *Harmer v Armstrong* [1934] Ch 65, CA.

9 *Annesley v Simeon* (1819) 4 Madd 390; *Reade v Sparkes* (1827) 1 Mol 8; *Gandy v Gandy* (1885) 30 ChD 57 at 69, 72, CA; *Re Genese, ex p Kearsley* (1886) 17 QBD 1.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/3. ADMINISTRATION OF TRUSTS/(4) RIGHTS AND LIABILITIES IN RELATION TO THIRD PARTIES/1083. Proceedings by beneficiary in respect of contract.

### **1083. Proceedings by beneficiary in respect of contract.**

In certain circumstances beneficiaries may themselves take independent proceedings against a person in respect of a contract entered into by that person with a trustee for them<sup>1</sup>. They may even sue a company which, by its constitution, is not to be affected by notice of a trust<sup>2</sup>.

<sup>1</sup> *Pollard v Downes* (1682) 2 Cas in Ch 121; *Tomlinson v Gill* (1756) Amb 330; *Gregory v Williams* (1817) 3 Mer 582 at 589-590; *Wilson v Moore* (1833) 1 My & K 126 (affd (1834) 1 My & K 337); *Fletcher v Fletcher* (1844) 4 Hare 67; *Touche v Metropolitan Railway Warehousing Co* (1871) 6 Ch App 671 at 677; *Harmer v Armstrong* [1934] Ch 65, CA; *Field v Firmenich & Co* [1971] 1 All ER 1104, sub nom *Re Field*, *Field v Firmenich & Co* [1971] 1 WLR 555. See also PARA 1082 text and notes 6-8 ante; and EQUITY vol 16(2) (Reissue) PARA 609. A beneficiary is not, however, entitled to use the name of his trustee for the purpose of proceedings against any other beneficiary: *Twigg and Franks v Mason* (1916) 50 ILT 173, HL. In some cases the right of the beneficiary to take proceedings to recover money may subsist notwithstanding that the right of the trustee is barred by lapse of time: *Williams v Papworth* [1900] AC 563, PC. See also LIMITATION PERIODS vol 68 (2008) PARA 1148.

<sup>2</sup> *Binney v Ince Hall Coal and Cannel Co* (1866) 35 LJ Ch 363 at 368.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(i) The Breach and Persons Liable/1084. Acts or omissions which constitute breaches of trust.

## 4. BREACH OF TRUST

### (1) LIABILITY

#### (i) The Breach and Persons Liable

#### 1084. Acts or omissions which constitute breaches of trust.

Any act by a trustee with reference to the trust property in contravention of the duties imposed on him by the trust<sup>1</sup>, or in excess of those duties<sup>2</sup>, and any neglect or omission on his part to fulfil those duties<sup>3</sup>, and the concurrence or acquiescence by one of several trustees in a similar act, neglect or omission on the part of a co-trustee<sup>4</sup>, constitutes a breach of trust<sup>5</sup>. However, a trustee who is guilty of negligence or breach of contract is not necessarily guilty of breach of trust or fiduciary duty<sup>6</sup>. If the breach of trust entails a loss to the trust estate, then as a general rule the trustee, and, after his decease or bankruptcy, the trustee's estate, are liable<sup>7</sup>. It is, however, necessary for the beneficiary to show a causal connection between the breach of duty and the resulting loss<sup>8</sup>.

A trustee may be relieved from liability by the provisions of the instrument creating the trust<sup>9</sup> or by statute<sup>10</sup>, or by the fact that the breach of trust has been occasioned by necessity or some other adequate cause<sup>11</sup>, or has been authorised or condoned by the beneficiary injured by it<sup>12</sup>, or has been due to an innocent mistake<sup>13</sup>. A mere error of judgment does not in itself constitute a breach of trust<sup>14</sup>, and a trustee is presumed to have dealt honestly and properly with the trust estate until the contrary is shown<sup>15</sup>. If a trustee personally makes a profit out of a breach of trust, he is liable to account to the beneficiaries for that profit unless the apparent breach was authorised by the trust instrument or by the beneficiaries<sup>16</sup>.

1 *Pye v Gorges* (1710) Prec Ch 308; *Mansell v Mansell* (1732) 2 P Wms 678; *Charitable Corp'n v Sutton* (1742) 9 Mod Rep 349; *Clough v Bond* (1838) 3 My & Cr 490 at 496 per Lord Cottenham LC; *Harrison v Randall* (1851) 9 Hare 397 at 407 per Turner V-C; *Reid v Thompson and M'Namara* (1851) 2 I Ch R 26; *Dance v Goldingham* (1873) 8 Ch App 902 at 909-910 per James LJ.

2 *Adair v Shaw* (1803) 1 Sch & Lef 243 at 274 per Lord Redesdale LC; *Collier v McBean* (1865) 34 Beav 426 at 431.

3 *Charitable Corp'n v Sutton* (1742) 9 Mod Rep 349; *Lord Montford v Lord Cadogan* (1810) 17 Ves 485; *Moyle v Moyle* (1831) 2 Russ & M 710 at 715 per Lord Brougham LC; *Taylor v Tabrum* (1833) 6 Sim 281; *Clough v Bond* (1838) 3 My & Cr 490 at 496 per Lord Cottenham LC; *Fenwick v Greenwell* (1847) 10 Beav 412; *Dix v Burford* (1854) 19 Beav 409 at 413 per Romilly MR; *Stone v Stone* (1869) 5 Ch App 74; *Jefferys v Marshall* (1870) 19 WR 94; *Re Brogden, Billing v Brogden* (1888) 38 ChD 546 at 567-568, CA, per Cotton LJ; *Evans v London Co-operative Society* (1976) Times, 6 July; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139. A trustee who at the request of one beneficiary neglects to sell the trust property when it can be sold advantageously, and afterwards sells it at a reduced price, is liable to make good the loss to the trust estate: *Taylor v Tabrum* supra; *Fry v Fry* (1859) 27 Beav 144. Cf *Re Evans, Jones v Evans* [1913] 1 Ch 23 at 33.

4 *Chambers v Minchin* (1802) 7 Ves 186; *Brice v Stokes* (1805) 11 Ves 319; *Munch v Cockerell* (1840) 5 My & Cr 178; *Brumridge v Brumridge* (1858) 27 Beav 5; *Earl of Gainsborough v Watcombe Terra Cotta Clay Co Ltd, Dunning v Earl of Gainsborough* (1885) 54 LJ Ch 991 at 996; *Re Bennison, Cutler v Boyd* (1889) 60 LT 859; *Re Lucking's Will Trusts, Renwick v Lucking* [1967] 3 All ER 726, [1968] 1 WLR 866. However, trustees are not liable for the breaches of their co-trustees per se: *Townley v Sherborn* (1634) Cro Car 312.

5 *Adair v Shaw* (1803) 1 Sch & Lef 243 at 272. It is a breach of trust, notwithstanding that the trust was voluntarily created by the trustee himself without any valuable consideration (*Drosier v Brereton* (1851) 15

Beav 221 at 225-226), and notwithstanding that the trustee derives no personal advantage from it (*Adair v Shaw* supra at 272; *Lord Montford v Lord Cadogan* (1810) 17 Ves 485 at 489). The fact of the trustee being remunerated for his services does not necessarily increase his liability (*Jobson v Palmer*[1893] 1 Ch 71 at 76 per Romer J), but may in some circumstances do so (*National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd*[1905] AC 373 at 381, PC; *Re Windsor Steam Coal Co (1901) Ltd*[1928] Ch 609 (affd [1929] 1 Ch 151, CA); *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton*[1952] 2 All ER 1054 at 1055, [1952] 2 TLR 877 per Harman J). A higher duty of care is expected from bodies such as trust corporations which carry on a specialised business of trust management; a professional corporate trustee is liable if it neglects to exercise the special care and skill which it professes to have: *Bartlett v Barclays Bank Trust Co Ltd*[1980] Ch 515, [1980] 1 All ER 139. As to breaches of charitable trusts see CHARITIES.

6 See *Bristol and West Building Society v Mothew (t/a Stapley & Co)*[1998] Ch 1, [1996] 4 All ER 698, CA. The distinction is significant. Equitable compensation for breach of the duty of skill and care resembles common law damages and there is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case: *Bristol and West Building Society v Mothew* supra at 17 and 711 per Millet LJ. See also *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA.

7 *Scurfield v Howes* (1790) 3 Bro CC 90; *Kearnan v Fitz-Simon* (1793) 3 Ridg Parl Rep 1; *Adair v Shaw* (1803) 1 Sch & Lef 243 at 272; *Moons v De Bernales, Kaison v De Bernales* (1826) 1 Russ 301; *Knatchbull v Fearnhead* (1837) 3 My & Cr 122; *Jenkins v Robertson* (1853) 1 Eq Rep 123; *Lander v Weston* (1855) 3 Drew 389; *Re Franklyn, Franklyn v Franklyn* (1913) 30 TLR 187, CA. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 524, 643. As to the liability of the personal representative of a deceased trustee for his breach of trust see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 786.

8 *Re Miller's Deed Trusts* [1978] LS Gaz R 454; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA; *Target Holdings Ltd v Redferns*[1996] AC 421, [1995] 3 All ER 785, HL. A distinction is made between an account of profits (the claimant need not prove causation) and equitable compensation for loss arising out of breach of fiduciary duty (a sufficient causal link must be established between the breach and the loss): *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 at [26]-[46], [2004] 1 BCLC 131 at [26]-[46] per Mummery LJ. As to causation, foreseeability and remoteness see PARA 1098 post.

9 See PARA 1114 post.

10 See PARAS 996 ante, 1116, 1124 et seq post.

11 See PARA 1059 ante.

12 See PARA 1118 et seq post.

13 The relief is available where the trustee derived no benefit from the breach arising out of the innocent mistake: *Crookshanks v Turner* (1723) 7 Bro Parl Cas 255, HL; *Re Biddulph, ex p Norris*(1869) 4 Ch App 280 at 287 per Giffard LJ. A mistake is not innocent where it could have been avoided by proper care or diligence, even when made under legal advice (*National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd*[1905] AC 373, PC), and a trustee may be liable for a breach of trust even though not aware that he has committed it (*Walker v Symonds* (1818) 3 Swan 1 at 69 per Lord Eldon LC; *Eaves v Hickson* (1861) 30 Beav 136 (trustees misled by a forged marriage certificate)). Relief is now available under the Trustee Act 1925 s 61: see PARA 1123 post.

14 *Wilkinson v Stafford* (1789) 1 Ves 32 at 41 per Lord Thurlow LC; *Garrett v Noble* (1834) 6 Sim 504; *Buxton v Buxton* (1835) 1 My & Cr 80; *Selby v Bowie* (1863) 9 Jur NS 425 at 426 per Turner LJ; *Stott v Milne*(1884) 25 ChD 710 at 713-714, CA, per Lord Selborne LC; *Re Hurst, Addison v Topp* (1892) 67 LT 96 at 100, CA, per Lindley LJ; *Re Beddoe, Downes v Cottam*[1893] 1 Ch 547 at 562, CA, per Bowen LJ; *Re Chapman, Cocks v Chapman*[1896] 2 Ch 763 at 778, CA, per Lopes LJ; *Re Kensit* [1908] WN 235.

15 *Taylor v Millington* (1858) 4 Jur NS 204 at 205 per Wood V-C.

16 *Boardman v Phipps*[1967] 2 AC 46, [1966] 3 All ER 721, HL. See also PARA 1109 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(i) The Breach and Persons Liable/1085. Persons liable.

### **1085. Persons liable.**

Liability for a breach of trust extends to a tenant for life in respect of matters as to which he is by the Settled Land Act 1925<sup>1</sup> placed in the position of a trustee<sup>2</sup>, and to a constructive trustee and trustee de son tort<sup>3</sup>; and also to a trustee who retires with a view to or with knowledge of an intended breach of trust<sup>4</sup>.

1 See the Settled Land Act 1925 s 107 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 775.

2 *Re Earl of Wilton's Settled Estates* [1907] 1 Ch 50 at 55-56 per Warrington J.

3 *Rackham v Siddall* (1849) 1 Mac & G 607 at 621 per Lord Cottenham LC; *Pearce v Pearce* (1856) 22 Beav 248; *Lee v Sankey* (1873) LR 15 Eq 204 at 211 per Bacon V-C; *Wassell v Leggatt* [1896] 1 Ch 554. See also PARA 1088 post. As to constructive trustees and trustees de son tort see PARAS 625, 687 et seq ante.

4 See PARA 894 ante.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(i) The Breach and Persons Liable/1086. Breach of trust in which several trustees are implicated.

### 1086. Breach of trust in which several trustees are implicated.

Where several trustees are implicated in a breach of trust, there is no primary liability for it between them, but they are all jointly and severally liable to a person who is entitled to sue in respect of it<sup>1</sup>. Where a breach of trust has been committed for which constructive trustees or trustees de son tort<sup>2</sup> as well as the duly appointed trustees are liable, the joint and several liability extends to the whole number<sup>3</sup>. Proceedings to obtain relief or redress in respect of a breach of trust may therefore be brought against some only of the persons who are liable for it<sup>4</sup>, and without making all who are liable for it parties to the proceedings<sup>5</sup>.

1 *Vandebende v Levingston* (1674) 3 Swan 625; *Charitable Corp'n v Sutton* (1742) 9 Mod Rep 349; *Wilson v Moore* (1833) 1 My & K 126 at 142-143 (affd 1 My & K 337); *A-G v Wilson* (1840) Cr & Ph 1; *Lyse v Kingdon* (1844) 1 Coll 184 at 188 per Knight Bruce V-C; *Fletcher v Green* (1864) 33 Beav 426; *A-G v Daugars* (1864) 33 Beav 621; *Re Biddulph, ex p Norris* (1869) 4 Ch App 280; *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189 at 203; *Re Faure Electric Accumulator Co* (1888) 40 ChD 141 at 158 per Kay J. After accepting a payment from one trustee by way of compromise in discharge of his liability for a breach of trust, a beneficiary was held entitled to prove in the bankruptcy of another trustee for the full amount due to the trust estate without giving credit for the compromise (but not so as to recover more than the full amount of the claim): *Edwards v Hood-Barrs* [1905] 1 Ch 20. See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 524. As to the liability of co-partners for a breach of trust committed by one of them see note 3 infra; and PARTNERSHIP vol 79 (2008) PARA 73.

2 As to constructive trustees and trustees de son tort see PARAS 625, 687 et seq ante.

3 *Cowper v Stoneham* (1893) 68 LT 18. Where the trustees' solicitors have as constructive trustees been parties to a breach of trust committed by the trustees, the solicitors may be joined as defendants in a proceedings against the trustees in respect of the breach, and are jointly and severally liable for it with the trustees: *Cowper v Stoneham* supra. A whole firm of solicitors may be held liable for the concurrence of one of their number in a breach of trust: see *Blyth v Fladgate*, *Morgan v Blyth*, *Smith v Blyth* [1891] 1 Ch 337; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97 (overruling *Re Bell's Indenture*, *Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217); and LEGAL PROFESSIONS vol 66 (2009) PARAS 793, 825. As to the scope of a professional trustee's insurance protection in these circumstances see *Macalister Todd Phillips Bodkins v AMP General Insurance Ltd* [2005] 2 NZLR 854, 8 ITEL 15, NZ HC. As to the distribution of liability among the persons responsible see PARA 1129 et seq post.

4 *Wilson v Moore* (1833) 1 My & K 337; *London Gas Light Co v Spottiswoode* (1851) 14 Beav 264. A trustee who is jointly liable for a breach of trust may take proceedings against his co-trustee who has derived the benefit from the breach to make good to the trust estate the loss occasioned thereby: *Beattie v Johnstone* (1848) 8 Hare 169; *Baynard v Woolley*, *Wearing v Baynard* (1855) 20 Beav 583; *Elwes v Barnard* (1865) 11 Jur NS 1035; but see *Chancellor v Morecraft* (1848) 11 Beav 262. As to proceedings to enforce the liability of a trustee see also PARA 963 et seq ante. Such proceedings are not dismissed on the ground of defect of form: *Burrowes v Gore* (1858) 6 HL Cas 907.

5 *Walker v Symonds* (1818) 3 Swan 1 at 75; *Perry v Knott* (1842) 5 Beav 293; *Kellaway v Johnson* (1842) 5 Beav 319; *A-G v Daugars* (1864) 33 Beav 621 at 624; *Price v Price* (1880) 42 LT 626. Where two classes of trustees are each liable for a breach of trust, the beneficiaries may proceed against one class without making the other class parties: *M'Gachen v Dew*, *Dew v M'Gachen* (1851) 15 Beav 84. As to proceedings against charity trustees see CHARITIES vol 8 (2010) PARA 612.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(i) The Breach and Persons Liable/1087. Bare trustee or nominee.

### **1087. Bare trustee or nominee.**

Where a bare legal estate in property is vested in a person, the nominee, in trust for a trustee who is interested in it upon trust for beneficiaries, and the nominee so deals with the legal estate as to sanction an act done by the trustee to the prejudice of the beneficiaries, he thereby becomes a party to the breach of trust and is answerable accordingly<sup>1</sup>. Where the trust is for the purpose of sale, then in the interests of the beneficiaries the nominee is bound to convey it to the trustee to enable him to execute his trust<sup>2</sup>. If, however, in parting with the legal estate he goes beyond the mere purpose of conveying it to the trustee and so deals with it as to facilitate a breach of trust by the trustee, he is deemed a party to the breach of trust, if it is committed, and is responsible for it<sup>3</sup>.

<sup>1</sup> *Angier v Stannard* (1834) 3 My & K 566 at 571 per Leach MR; and see *Margetts v Perks* (1864) 34 LJ Ch 109.

<sup>2</sup> *Angier v Stannard* (1834) 3 My & K 566 at 571.

<sup>3</sup> *Angier v Stannard* (1834) 3 My & K 566 at 571.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(i) The Breach and Persons Liable/1088. Liability of third parties.

### **1088. Liability of third parties.**

A person, not being a trustee, renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it<sup>1</sup>, or knowingly receives trust property and deals with it in a manner inconsistent with the trust<sup>2</sup>, or where in acting for the trustee he commits a wrong for which he is liable to the trustee<sup>3</sup>. He is not, however, liable for a breach of trust where he has no knowledge of the trust or of the intended breach of trust, or where he merely acts as agent for a trustee<sup>4</sup>.

Where an agent or a third person by his conduct or the circumstances of the case has become a constructive or implied trustee or a trustee de son tort, he incurs for a breach of trust a liability similar to that of an express trustee<sup>5</sup>.

1 See PARA 704 ante.

2 See PARA 698 et seq ante.

3 *Sadler v Lee* (1843) 6 Beav 324. As to the liability of agents for breach of trust see also AGENCY vol 1 (2008) PARA 166.

4 See PARA 698 et seq ante. The Trustee Act 1925 and every order purporting to be made under it is a complete indemnity to the Bank of England, the Registrar of Government Stock, any previous Registrar of Government Stock and to all persons for any acts done pursuant to it, and it is not necessary for the Bank, Registrar, former Registrar or for any person to inquire concerning the propriety of the order, or whether the court by which the order was made had jurisdiction to make the order: s 66 (amended by the Government Stock (Consequential and Transitional Provision)(No 2) Order 2004, SI 2004/1662, art 2, Schedule Pt 2 para 10(1), (3)). As to the liability of bankers and solicitors see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 841, 843; LEGAL PROFESSIONS vol 66 (2009) PARA 793.

5 See PARA 703 ante. As to the remedies and penalties for breach of trust see PARA 1089 et seq post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1089. Civil and criminal liability.

## (ii) Remedies and Penalties

### 1089. Civil and criminal liability.

A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction<sup>1</sup>. A breach of trust is, in equity, regarded as giving rise to a simple contract debt<sup>2</sup>, unless the trustee has covenanted by deed<sup>3</sup> that he will perform the trust, in which case his breach of trust, being also a breach of covenant, gives rise to a speciality debt<sup>4</sup>. Such a covenant may be created by a deed<sup>5</sup> containing an express agreement that he will perform the trust<sup>6</sup>, or a declaration to that effect<sup>7</sup>, or may be raised by necessary implication from such an instrument<sup>8</sup>. The mere fact of his accepting the trust by a deed does not, however, constitute a covenant by him to carry the trust into effect<sup>9</sup>.

A trustee who dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it is guilty of theft<sup>10</sup>, and for this purpose the persons to whom property subject to a trust belongs are to be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust is to be regarded accordingly as an intention to deprive of the property any person having that right<sup>11</sup>.

1 Co Litt 272b; *Sturt v Mellish* (1743) 2 Atk 610 at 612 per Lord Hardwicke LC; *Allen v Imlett* (1817) Holt NP 641; *Re Lake, ex p Dyer*[1901] 1 KB 710 at 715, CA, per Rigby LJ. Under the former rules of court, in proceedings for breach of trust the actual breaches had to be specified and full particulars of them had to be set out in the pleadings: see RSC Ord 18 r 12(1) (revoked). The plaintiff was not allowed at the trial to complain of breaches outside the particulars given in the statement of claim: *Re Anstice, Anstice v Hibbell* (1885) 33 WR 557; *Re Wrightson, Wrightson v Cooke*[1908] 1 Ch 789 at 799; cf *Re Symons, Luke v Tonkin*(1882) 21 ChD 757; *Re Armitage, Smith v Armitage*(1883) 24 ChD 727. Under the CPR, as part of its responsibility for managing cases, the court will ensure that the parties plainly state the factual ingredients of their case so that the true nature and scope of the dispute can be identified. The aim is to avoid the need for further exchanges between the parties. However, a broad power is given to enable the court where necessary at any time to order a party to clarify any matter which is in dispute in the proceedings or to give additional information in relation to any such matter: see CPR 18. As to the liability of charity trustees see also CHARITIES.

2 *Cox v Bateman* (1715) 2 Ves Sen 19; *Vernon v Vawdry* (1740) 2 Atk 119; *Kearnan v Fitz-Simon* (1793) 3 Ridg Parl Rep 1; *Adey v Arnold* (1852) 2 De GM & G 432; *Brereton v Hutchinson* (1854) 31 Ch R 361 at 367-368, Ir CA, per Brady LC; *Brittlebank v Goodwin*(1868) LR 5 Eq 545 at 551 et seq per Giffard V-C. Strictly speaking, the relation of debtor and creditor does not subsist between a trustee and his beneficiary (*Re Goldsmid, ex p Taylor*(1886) 18 QBD 295 at 301, CA, per Lindley LJ; *Re Lake, ex p Dyer*[1901] 1 KB 710 at 715, CA, per Rigby LJ, questioning the dictum of Lord Halsbury LC in *Sharp v Jackson*[1899] AC 419 at 426, HL), nor between a trustee and a co-trustee (*Re Goldsmid, ex p Taylor* supra at 301). However, where there is no trust to execute except paying over the money, proceedings for money had and received may be brought against a trustee on an admission that a balance belonging to the beneficiary is in his hands: *Roper v Holland* (1835) 3 Ad & El 99; *Cummins v Cummins* (1845) 3 Jo & Lat 64; *Sinclair v Wilson* (1855) 20 Beav 324; *Re Wilkinson, ex p Stubbins*(1881) 17 ChD 58, CA; *Re Goldsmid, ex p Taylor* supra. See further RESTITUTION.

3 *Richardson v Jenkins* (1853) 1 Drew 477 at 481 per Kindersley V-C. See also *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd*[1986] 3 All ER 75, [1986] 1 WLR 1072, PC; and the comments of Handley JA and Cripps JA in *Wickstead v Browne* (1992) 30 NSWLR 1 at 14. Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 7, 32.

4 *Primrose v Bromley* (1739) 1 Atk 89; *Lord Montford v Lord Cadogan* (1816) 19 Ves 635 at 638 per Lord Eldon LC; *Jameson v Farrer* (1841) 3 I Eq R 346; *Wood v Hardisty* (1846) 2 Coll 542; *Adey v Arnold* (1852) 2 De GM & G 432; *Richardson v Jenkins* (1853) 1 Drew 477 at 481; *Newport v Bryan* (1856) 51 Ch R 119.

5 *Richardson v Jenkins* (1853) 1 Drew 477 at 481.

6 The deed must contain words to raise a covenant on which a claim would lie at law: *Adey v Arnold* (1852) 2 De GM & G 432; *Richardson v Jenkins* (1853) 1 Drew 477; *Holland v Holland* (1869) 4 Ch App 449 at 459 per Giffard LJ. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 251.

7 The words 'it is hereby declared' contained in a deed executed by the trustee raise a covenant as effectually as words of agreement: *Richardson v Jenkins* (1853) 1 Drew 477 at 482-483; *Alexander v Foster* (1856) 5 WR 33.

8 *Turner v Wardle, Barker v Wardle* (1834) 7 Sim 80. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 250 et seq. A covenant is not implied unnecessarily: *Bartlett v Hodgson* (1785) 1 Term Rep 42; *Adey v Arnold* (1852) 2 De GM & G 432 at 437 per Lord St Leonards LC.

9 *Wynch v Grant* (1854) 2 Drew 312; *Isaacson v Harwood, Brook v Harwood* (1868) 3 Ch App 225.

10 See the Theft Act 1968 s 1(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 290 et seq.

11 See *ibid* s 5(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1090. Election between remedies.

### **1090. Election between remedies.**

Where a trustee receives an unauthorised profit in breach of his fiduciary duty he is liable to account for the profit received<sup>1</sup> but where he commits a breach of trust he is liable to restore the trust fund or compensate the trust for losses sustained<sup>2</sup>. If more than one remedy is available in respect of the same breach it is necessary to establish whether the remedies are alternative, in which case the beneficiaries must elect between them<sup>3</sup>, or cumulative, in which case the beneficiaries may be able to recover under both although the principle of full satisfaction will prevent double recovery.<sup>4</sup>

1 See PARAS 928 ante, 1109 post.

2 See PARA 1099 et seq post.

3 *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, [1996] 1 All ER 193, PC holding that the remedies of equitable account of profits and equitable compensation for loss in respect of the same breach are alternative remedies (relying on *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL).

4 *Westminster City Council v Porter* [2002] EWHC 1589 (Ch), [2002] EWHC 2179 (Ch), [2003] Ch 436 (holding that a claimant was entitled to pursue an equitable remedy for breach of fiduciary duty concurrently with a statutory remedy in respect of the same claim but was not entitled to recover anything more than the higher of the two sums).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1091. Liability of trustee who is also beneficiary.

### **1091. Liability of trustee who is also beneficiary.**

Where a trustee who is also a beneficiary commits a breach of trust, his beneficial interest in the trust property is liable for making good the loss occasioned thereby before he can claim anything for himself<sup>1</sup>. His assignee is in no better position, even where the breach was committed by him after assigning his beneficial interest<sup>2</sup>.

1 *Fox v Buckley* (1876) 3 ChD 508 at 509 note (1), CA, per Little V-C; *Re Brown, Dixon v Brown* (1886) 32 ChD 597; *Chillingworth v Chambers* [1896] 1 Ch 685, CA; *Re Rhodesia Goldfields Ltd, Partridge v Rhodesia Goldfields Ltd* [1910] 1 Ch 239; *Re Towndrow, Gratton v Machen* [1911] 1 Ch 662; *Re Dacre, Whitaker v Dacre* [1916] 1 Ch 344, CA; *Selangor United Rubber Estates Ltd v Cradock (No 4)* [1969] 3 All ER 965, [1969] 1 WLR 1773. See also PARA 1129 et seq post.

2 *Doering v Doering* (1889) 42 ChD 203. See also PARA 923 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1092. Liability of trustee on default in obeying orders for payment.

**1092. Liability of trustee on default in obeying orders for payment.**

A trustee who is ordered by the High Court to pay a sum of money in his possession or under his control, and who makes default in doing so, is liable to attachment and imprisonment<sup>1</sup>.

<sup>1</sup> See CONTEMPT OF COURT vol 9(1) (Reissue) PARA 485. See also *Evans v Bear* (1874) 10 Ch App 76; *Re Strong* (1886) 32 ChD 342 at 347, CA. As to the enforcement of money judgments see CPR 70.2; *Practice Direction- Enforcement of judgments and Orders* PD 70; and CIVIL PROCEDURE vol 12 (2009) PARA 1265 et seq.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1093. Solicitor-trustee.

### **1093. Solicitor-trustee.**

Where a solicitor is a trustee or in a fiduciary position<sup>1</sup>, the court may exercise its summary jurisdiction over him in his capacity as an officer of the Supreme Court<sup>2</sup>, for example to remedy a breach of his undertaking as a solicitor or a failure as solicitor to a trustee to pay over trust money; but the court will not intervene summarily where he acts in his private capacity as trustee<sup>3</sup>.

A solicitor who as a trustee commits a fraudulent breach of trust is liable to have his name struck off the roll<sup>4</sup>.

1 As to the liability of a firm of solicitors for the acts of one of their number see PARA 1086 note 3 ante.

2 As to the disciplinary jurisdiction of the Supreme Court over solicitors see LEGAL PROFESSIONS vol 65 (2008) PARA 745 et seq. As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

3 See LEGAL PROFESSIONS vol 65 (2008) PARA 748.

4 See LEGAL PROFESSIONS vol 66 (2009) PARA 909 et seq. The ground of application is conduct unbefitting a solicitor; fraudulent breach of trust is not of itself a statutory ground for striking a solicitor's name off the roll, but, by reason of the fraud, the conduct would rank as disgraceful conduct: see LEGAL PROFESSIONS vol 66 (2009) PARA 922.

### **UPDATE**

#### **1093 Solicitor-trustee**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1094. Injunction against contemplated breach of trust.

**1094. Injunction against contemplated breach of trust.**

Where the court is satisfied that trustees are contemplating a breach of trust, it may restrain the commission of that breach by injunction<sup>1</sup>.

<sup>1</sup> See PARA 974 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 471.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1095. Securing trust property.

### **1095. Securing trust property.**

A receiver may be appointed on the application of any beneficiary if the appointment is required for the safety of the trust property or the due administration of the trust<sup>1</sup>. Where trust property is in jeopardy by reason of the trustee's conduct or his death or incapacity or bankruptcy an injunction may be granted to restrain the trustee from further acting in the trust<sup>2</sup>, or a writ of possession or delivery may be obtained<sup>3</sup>, or the property may be ordered to be paid into court<sup>4</sup>.

<sup>1</sup> See RECEIVERS vol 39(2) (Reissue) PARA 334. As to constructive trusts see *Cassidy v Hopkins* (1847) 10 I Eq R 208.

<sup>2</sup> See CIVIL PROCEDURE vol 11 (2009) PARAS 470-471.

<sup>3</sup> See CPR Sch 1 RSC Ord 45 rr 3, 4; and CIVIL PROCEDURE.

<sup>4</sup> *Wyatt v Sharratt* (1840) 3 Beav 498; *Cole v Muddle* (1852) 10 Hare 186; *Wiglesworth v Wiglesworth* (1852) 16 Beav 269; *Re Clerihew's Estate*, *Clerihew v Clerihew*, *Re Howard* (1871) 24 LT 860; *Stanier v Evans*, *Evans v Stanier* (1886) 34 ChD 470; *Re Carroll*, *Brice v Carroll* [1902] 2 Ch 175. See also PARA 1069 ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1096. Refusal of specific performance of contract involving breach of trust.

### **1096. Refusal of specific performance of contract involving breach of trust.**

The court never lends its assistance to the commission of a breach of trust<sup>1</sup>, and, therefore, does not decree specific performance of a contract which involves a breach of trust<sup>2</sup>.

<sup>1</sup> *Wood v Richardson* (1840) 4 Beav 174 at 176-177 per Lord Langdale MR; *Maw v Topham* (1854) 19 Beav 576 at 578 per Romilly MR; *Roberts v Death* (1881) 8 QBD 319, CA; *Bowman v Hill* [1907] 1 IR 451, Ir CA. See also *Rede v Oakes* (1864) 4 De GJ & Sm 505.

<sup>2</sup> See SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 867.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(ii) Remedies and Penalties/1097. Injunction freezing trustee's assets.

### **1097. Injunction freezing trustee's assets.**

Where a trustee is merely personally accountable, the court will not normally grant an injunction to restrain him from parting with his assets pending trial<sup>1</sup>; the claimant, like other creditors of the defendant, must obtain his judgment and then enforce it<sup>2</sup>. If, however, there is a risk of the defendant frustrating some future judgment by removing his assets from the jurisdiction or disposing of or dealing with any of his assets within the jurisdiction, the court may grant an injunction to preserve sufficient assets to meet the claim<sup>3</sup>.

1 *Lister & Co v Stubbs* (1890) 45 ChD 1, CA (injunction not available in respect of assets purchased with money received as a bribe or secret commission). As to whether the moneys are in fact subject to a constructive trust see *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC; and PARA 696 ante. See also PARA 1069 ante.

2 *Barclay-Johnson v Yuill* [1980] 3 All ER 190 at 193, [1980] 1 WLR 1259 at 1262.

3 Such an injunction, previously known as a Mareva injunction, is now called a freezing injunction. See the Supreme Court Act 1981 s 37(3); and CIVIL PROCEDURE vol 11 (2009) PARAS 396-401. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

#### **UPDATE**

### **1097 Injunction freezing trustee's assets**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/A. MEASURE OF LIABILITY FOR LOST PRINCIPAL/1098. Causation, foreseeability and remoteness.

### **(iii) Extent of Liability for Breach of Trust**

#### **A. MEASURE OF LIABILITY FOR LOST PRINCIPAL**

##### **1098. Causation, foreseeability and remoteness.**

The obligation of a trustee who is held liable for a breach of trust is fundamentally different from the obligation of a contractual or tortious wrongdoer. The common law rules of foreseeability, remoteness of damage and causation do not apply<sup>1</sup>. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable<sup>2</sup>. There is some uncertainty as to the position where the breach of duty falls within the category of inequitable conduct which equity regards as fraud<sup>3</sup>.

1 *Target Holdings Ltd v Redferns (a firm)*[1996] AC 421 at 434, [1995] 3 All ER 785 at 794, HL, per Lord Browne-Wilkinson (relying on *Re Dawson* [1966] 2 NSWLR 211 and *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92). The same principles apply in cases of breach of fiduciary duty: *Swindle v Harrison*[1997] 4 All ER 705, CA. But see *Bristol and West Building Society v Mothew (t/a Stapley & Co)*[1998] Ch 1 at 16-17, [1996] 4 All ER 698 at 710-711, CA, per Millett LJ (not every breach of duty by a fiduciary is a breach of fiduciary duty; equitable compensation for breach of the duty of skill and care resembles common law damages and there is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case).

2 *Target Holdings Ltd v Redferns (a firm)*[1996] AC 421 at 434, [1995] 3 All ER 785 at 794, HL, per Lord Browne-Wilkinson (relying on *Re Miller's Deed Trusts* (1978) 75 LS Gaz 454 and *Nestle v National Westminster Bank plc*[1994] 1 All ER 118, [1993] 1 WLR 1260); *Swindle v Harrison*[1997] 4 All ER 705, CA.

3 Where the breach of fiduciary duty is the equitable equivalent of fraud the defendant's liability in damages is measured in the same way as if fraud was proved at common law. The defendant is liable to restore the claimant to the situation he was in when the defendant did him wrong irrespective of what the claimant would have done had there been no breach: *Swindle v Harrison*[1997] 4 All ER 705 at 715, CA, per Evans LJ (dicta cited in *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606 at 656-658 per Blackburne J; but doubted in *Collins v Brebner* [2000] Lloyd's Rep PN 587 at 590, CA, per Tuckey LJ).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/A. MEASURE OF LIABILITY FOR LOST PRINCIPAL/1099. Traditional trusts where the trusts are still subsisting.

### 1099. Traditional trusts where the trusts are still subsisting.

The extent of the liability incurred by a trustee who is responsible for a breach of trust is measured by the extent of the loss or depreciation which his act or omission has caused to the trust estate; and he is liable to restore to the estate the property which it has thereby lost or its value, and to make good any depreciation and damage which the estate has thereby suffered<sup>1</sup>. A trustee cannot reduce his liability by taking into account a sum corresponding to the amount of tax that would have been payable if no breach of trust had been committed<sup>2</sup>. The liability of a trustee extends to profits which he would have received but for his wilful default or neglect<sup>3</sup>; it is not limited to what the trustee who is charged with default has actually received and still less to any benefit which he may have personally derived from the breach<sup>4</sup>. There is no authority for the existence of any distinction in this respect between a case where a trust fund has been collected and subsequently lost and a case of a fund lost through the neglect of a trustee to collect it<sup>5</sup>. If the trustee makes an unauthorised investment, he is liable for the loss incurred on realising it<sup>6</sup>. Where the breach of trust has deprived the party who ought to have had the assets throughout the relevant period of the opportunity of realising them at any point he chose, the defaulting party must make compensation on the footing of the lost value of the opportunity at its highest point<sup>7</sup>.

If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate, assessed as at the date of judgment, to put it back to what it would have been had the breach not been committed<sup>8</sup>.

1 *Younge v Combe* (1798) 4 Ves 101; *Caffrey v Darby* (1801) 6 Ves 488; *French v Hobson* (1803) 9 Ves 103; *Bennett v Colley* (1833) 2 My & K 225; *Morris v Livie* (1842) 1 Y & C Ch Cas 380; *Challen v Shippam* (1845) 4 Hare 555; *Robinson v Robinson* (1851) 1 De GM & G 247 at 255 per Lord Cranworth LJ; *Gibbins v Taylor* (1856) 22 Beav 344; *Craven v Craddock* [1868] WN 229 (revsd [1869] WN 48, 20 LT 638); *Re Biddulph, ex p Norris* (1869) 4 Ch App 280; *Cann v Cann* (1884) 51 LT 770; *Re Deane, Bridger v Deane* (1889) 42 ChD 9, CA; *Re Newen, Smiles v Carruthers* (1912) 133 LT Jo 589; *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJ Ch 557. Where a trustee incautiously invests trust money on a security authorised by the terms of the trust but of insufficient value, he is liable for the deficiency on a realisation of the security: *Re Salmon, Priest v Uppleby* (1889) 42 ChD 351, CA. The court does not assent to any compromise which does not replace the whole of the trust money, where the trustee is able to pay it: *Re Dewar, Dewar v Brooke* (1885) 54 LJ Ch 830 at 833 per Kay J. See *Target Holdings Ltd v Redfems (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL ('Both at common law and in equity liability is fault based. The defendant is only liable for the consequences of the legal wrong he has done to the claimant and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong': at 432 and 792 per Lord Browne-Wilkinson). See also *Swindle v Harrison* [1997] 4 All ER 705, CA.

2 *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92; *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217 (overruled on a different point by *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97).

3 *Howell v Howell* (1837) 2 My & Cr 478 at 486; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92.

4 *Adair v Shaw* (1803) 1 Sch & Lef 243 at 272.

5 See *Re Godwin's Settlement, Godwin v Godwin* (1918) 87 LJ Ch 645 at 647.

6 *Knott v Cottee* (1852) 16 Beav 77 (where improper investments were ordered into court and sold at a loss, and the trustees were held liable for that loss even though at the date of the subsequent court decree there would have been no loss if the investments had been retained).

7 *Jaffray v Marshall* [1994] 1 All ER 143, [1993] 1 WLR 1285. But see *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 440, [1995] 3 All ER 785 at 799, HL, where Lord Browne-Wilkinson was of the opinion that *Jaffray v Marshall* *supra* had been wrongly decided.

8 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 794, HL, per Lord Browne-Wilkinson (citing *Caffrey v Darby* (1801) 6 Ves 488; *Clough v Bond* (1838) 3 My & Cr 490).



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### **1100. Traditional trusts where trusts have come to an end.**

In traditional trusts for persons by way of succession, once those trusts have been exhausted and the fund has become absolutely vested in possession, the beneficiary is not normally entitled to have the exhausted trust reconstituted. His right is to be compensated for the loss he has suffered by reason of the breach assessed as at the date of judgment<sup>1</sup>.

<sup>1</sup> *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL; applied in *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] All ER (D) 309 (Jan).

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### **1101. Non-traditional trusts.**

In the modern world the trust has become a valuable device in commercial and financial dealings. Though the fundamental principles of equity apply equally to these as to traditional trusts, it is necessary to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind. Thus if in connection with a conveyancing transaction a client pays moneys to his solicitor these are trust moneys, and if they are wrongly paid away, until the underlying commercial transaction has been completed, the solicitor can be required to restore the moneys to the client's account. However, once the transaction has been completed the solicitor cannot be required to reconstitute the fund: the principle of equitable compensation applies under which the client beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach assessed as at the date of judgment<sup>1</sup>. The position is different where the defendant, though not strictly a trustee, has undertaken fiduciary obligations which involve heavy and continuing responsibilities for the stewardship of another's assets<sup>2</sup>.

1 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL.

2 *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531 (where the liability of directors for paying unlawful dividends out of company funds was not limited to the difference between the unlawful dividends and the dividends which could and would lawfully have been paid); distinguishing *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL, on the grounds that the trust in that case was simply an aspect of a wider commercial transaction involving agency. According to Walker LJ a more satisfactory dividing line is not that between the traditional trust and the commercial trust, but between a breach of fiduciary duty in the wrongful disbursement of funds of which the fiduciary has a sort of trustee-like stewardship and a breach of fiduciary duty of a different character such as a solicitor's failure to disclose conflict of interest: *Bairstow v Queens Moat Houses plc* supra at [53]. As to the position of a director as trustee of the company property see *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162. But see *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131, where a director who dishonestly breached his fiduciary duty resulting in misapplication of company funds was not liable in the absence of evidence that the company would have acted differently if the true position had been known.

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### **1102. Absence of right of set-off in case of breaches of trust.**

Where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, but is liable for the whole loss occasioned by the one breach, while the estate is entitled to the whole gain realised by the other<sup>1</sup>.

<sup>1</sup> *Adye v Feuillateau* (1783) 3 Swan 84n. See also *Robinson v Robinson* (1848) 11 Beav 371 at 375 per Lord Langdale MR (varied on appeal (1851) 1 De GM & G 247); *Wiles v Gresham* (1854) 2 Drew 258. If a trustee loses one part of the trust estate, he must answer for it, whatever may be the improvement of the other part: *Wiles v Gresham* supra at 271 per Kindersley V-C; *Re Barker, Ravenshaw v Barker* (1898) 77 LT 712. A trustee may, however, set off gain and loss in the same transaction: *Fletcher v Green* (1864) 33 Beav 426; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139. See also *Hulbert v Avens* [2003] EWHC 76 (Ch), [2003] All ER (D) 309 (Jan). See also PARA 1104 post.

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### **1103. Payment of trust moneys to a third party.**

Where a trustee in breach of trust pays away trust moneys to a person who has no right to receive the same, there is an immediate loss, placing the trustee under an immediate duty to restore the moneys to the trust fund. However, the fact that there is an accrued cause of action as soon as the breach is committed does not mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment, at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it or he would have been in had there been no breach. The purpose of equitable compensation is to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach<sup>1</sup>.

As between the trustees and a person who is wrongly paid, the trustees, under the law of restitution based on the principle of unjust enrichment, have a right to recover the payment if it was paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution such as the defence of change of position<sup>2</sup>. A trustee who transfers trust property in breach of trust is not prevented by that breach from asserting a claim for the recovery of the trust property or its proceeds from the transferee<sup>3</sup>.

1 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421, [1995] 3 All ER 785, HL; *Bristol and West Building Society v May, May & Merrimans (a firm)* [1996] 2 All ER 801.

2 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nuridin and Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249; *Fea v Roberts* [2005] EWHC 2186 (Ch), 8 ITEL 231; *Re Clapham, Barraclough v Mell* [2006] WTLR 203. See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. As to recovery of payment made under a mistake see RESTITUTION vol 40(1) (2007 Reissue) PARA 28 et seq. As to the defence of change of position see RESTITUTION vol 40(1) (2007 Reissue) PARAS 166-169.

3 *Montrose Investment Ltd v Orion Nominees Ltd* [2004] EWCA Civ 1032, 7 ITEL 255.

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#### **1104. Improper reinvestment and neglect to invest.**

Where a trustee improperly sells a proper investment and invests in an improper investment, *prima facie* he is liable to replace the investment sold (and not merely to make good the proceeds misapplied); and if sale of the improper investment realises more than is required for this purpose, the excess belongs to the trust estate<sup>1</sup>. The replacement should be at the value of the proper investment at the date of the judgment or, exceptionally, the trustee may be liable to pay the difference in its price as between the date of the sale and the date at which it would, in any event, have been sold<sup>2</sup>. A trustee is, however, never charged with imaginary values<sup>3</sup>; and, where there is no loss, there is no liability<sup>4</sup>. If, therefore, he improperly invests trust money on an insufficient security which is realised at a loss, and the proceeds are invested in stock which is subsequently sold at a profit, he is entitled to the benefit of the profit towards discharge of his liability<sup>5</sup>.

Where a trustee is directed to invest trust money in a particular stock or security and neglects to do so, he may at the option of the beneficiary be charged either with the principal sum which he has retained uninvested and interest on it<sup>6</sup>, or with the amount of the stock or security which could have been purchased when he ought to have made the investment, and the dividends which would have accrued<sup>7</sup>. This option does not exist where the trustee has an alternative power to invest in real security, since, if he had done so, the capital of the trust fund would remain at the original figure<sup>8</sup>.

1 *Earl Powlet v Herbert* (1791) 1 Ves 297; *Pocock v Reddington* (1801) 5 Ves 794; *Phillipson v Gatty* (1848) 6 Hare 26 (affd 7 Hare 516); *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217 (overruled on a different point by *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97). Similarly, where the trust instrument required the consent of the tenant for life to any variation of investment, and trustees with such consent sold an authorised investment for the purpose of making an unauthorised investment, they were held bound either to replace the stock originally sold or pay the difference in its price as between the date of its sale and the date when proceedings were begun: *Re Massingberd's Settlement, Clark v Trelawney* (1890) 63 LT 296, CA. The date of the judgment seems more appropriate than the date when the proceedings were begun, as pointed out in *Re Bell's Indenture, Bell v Hickley* supra.

2 *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217 (overruled on a different point by *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97).

3 *Palmer v Jones* (1682) 1 Vern 144.

4 *Re Deane, Bridger v Deane* (1889) 42 ChD 9 at 19, CA, per Lord Esher MR. The fact that a higher interest than would have been produced by authorised investments has been paid to a beneficiary for life from an unauthorised investment of trust money does not render the trustee liable to recoup the difference to the capital of the trust estate where he restores the principal sum in full: *Stroud v Gwyer* (1860) 28 Beav 130; *Re Appleby, Walker v Lever, Walker v Nisbet* [1903] 1 Ch 565, CA; *Slade v Chaine* [1908] 1 Ch 522, CA; *Re Hoyles, Row v Jagg (No 2)* [1912] 1 Ch 67.

5 *Fletcher v Green* (1864) 33 Beav 426. See also *Earl of Winchelsea v Norcliffe* (1686) 1 Vern 435. Where a trust estate, consisting in part of new shares in a company liable to calls and allotted in respect of original shares forming part of the estate, was lost through default of the trustee, he was held liable to make good the value of the estate less the amount of the calls on the new shares which had in fact been paid by him: *Briggs v Massey* (1882) 51 LJ Ch 447, CA.

6 See PARA 1106 et seq post. Cf para 1099 ante.

7 *Byrchall v Bradford* (1821) 6 Madd 13; *Robinson v Robinson* (1851) 1 De GM & G 247 at 256, 260-261 per Lord Cranworth LJ. As to the position where the trustee lends or uses the uninvested money in trade see PARA 1109 post.

8 *Marsh v Hunter* (1822) 6 Madd 295; *Shepherd v Moults* (1845) 4 Hare 500; *Rees v Williams* (1847) 1 De G & Sm 314; *Robinson v Robinson* (1851) 1 De GM & G 247 at 257. Where a person is bound to do one of two things and does neither, the measure of damages is in general the loss arising from his having failed to do that which is the less beneficial of the two: *Robinson v Robinson* supra at 257-258. Where a range of investments is authorised, the beneficiaries may only claim for the principal sum and interest on it as it is impossible to say which of the investments the trustees would have chosen: *Shepherd v Moults* supra; *Robinson v Robinson* supra.

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### **1105. Neglect to realise security.**

Where a loss is sustained through a breach of trust on a trustee's part in neglecting to realise a security, he is charged with the full amount of the loss unless he can show that the full value of the security would not have been produced if he had realised the security when he ought to have done so<sup>1</sup>. If he shows this, his liability is limited to the amount by which the actual loss exceeds the sum which might have been obtained on a realisation made at the proper time<sup>2</sup>.

<sup>1</sup> *Earl of Gainsborough v Watcombe Terra Cotta Clay Co Ltd, Dunning v Earl of Gainsborough* (1885) 54 LJ Ch 991.

<sup>2</sup> *Earl of Gainsborough v Watcombe Terra Cotta Clay Co Ltd, Dunning v Earl of Gainsborough* (1885) 54 LJ Ch 991.

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## **B. PAYMENT OF INTEREST**

### **1106. Liability for interest.**

Besides being required to account for principal trust money, a trustee is also charged with interest<sup>1</sup> on it where he can be proved to have received interest, or where the court considers that he ought to have received interest. Thus a trustee is liable for interest where in breach of his duty he: (1) retains trust money in his own hands uninvested<sup>2</sup>; or (2) mixes it with his own money or property<sup>3</sup>; or (3) employs it in trade or speculation<sup>4</sup>; or (4) applies it in an unauthorised manner<sup>5</sup>; or (5) pays it to the wrong person<sup>6</sup>; or (6) fails to produce or account for it when lawfully demanded by the beneficiary or ordered by the court<sup>7</sup>.

1 As to the apportionment of interest from the date of the claim form until judgment see *Jaffray v Marshall*[1994] 1 All ER 143, [1994] 1 WLR 1285.

2 *Franklin v Frith* (1792) 3 Bro CC 433; *Ashburnham v Thompson* (1807) 13 Ves 402; *Dawson v Massey* (1809) 1 Ball & B 219 at 230-231 per Lord Manners LC; *Tebbs v Carpenter* (1816) 1 Madd 290; *Mousley v Carr* (1841) 4 Beav 49; *Robinson v Robinson* (1851) 1 De GM & G 247 at 255-256; *Re Hulkes, Powell v Hulkes*(1886) 33 ChD 552 at 558. See also PARA 968 ante.

3 *Melland v Gray* (1845) 2 Coll 295 at 301; *Williams v Powell* (1852) 15 Beav 461; *Cook v Addison*(1869) LR 7 Eq 466.

4 See PARA 1109 post.

5 *Hutchins v Hutchins* (1851) 15 Jur 869; *Re Faure Electric Accumulator Co*(1888) 40 ChD 141 at 158; *Wassell v Leggatt*[1896] 1 Ch 554; *Gordon v Gonda*[1955] 2 All ER 762, [1955] 1 WLR 885, CA; *Bartlett v Barclays Bank Trust Co Ltd (No 2)*[1980] Ch 515, [1980] 2 All ER 92.

6 *Re Hulkes, Powell v Hulkes*(1886) 33 ChD 552.

7 *Sammes v Rickman* (1792) 2 Ves 36; *Pearse v Green* (1819) 1 Jac & W 135 at 140-141; *Dobson v Pattinson* (1857) 5 WR 771; *Wroe v Seed* (1863) 4 Giff 425; *Price v Price* (1880) 42 LT 626.



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### **1107. Interest on income.**

A trustee is not generally charged with interest on the income which accrues during the time in which trust property is improperly dealt with<sup>1</sup>.

<sup>1</sup> *Macartney v Blackwood* (1795) Ridg L & S 602; *Re Lord Magheramorne's Estate, Hogg v Hogg* [1901] WN 152. Where, however, the breach of trust takes place with reference to the income, he may be charged with interest in respect of it: *Melland v Gray* (1845) 2 Coll 295.

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### 1108. Rate of interest.

Where a trustee simply fails to invest trust money which he ought to have invested, and there are no special circumstances in the case, he is in general charged with simple interest. According to some cases the rate is that allowed from time to time on money in the Supreme Court on the special account<sup>1</sup>; and according to others it is one per cent above bank rate<sup>2</sup>. He will be charged at the actual higher rate he received where his breach of trust led to his receiving a higher rate of interest<sup>3</sup>. He will be charged at the higher rate which he ought to have continued to receive where he improperly sold a higher income producing investment and purchased a lower income producing improper investment<sup>4</sup>. He will also be charged at a higher rate if he used the trust property for his own commercial advantage or was guilty of fraud or serious misconduct<sup>5</sup>; in such a case he will normally be charged compound interest with yearly rests at one per cent above the clearing banks' base rate from time to time<sup>6</sup>, although, if his commercial profit from the trust property is ascertainable, the beneficiaries have the option of claiming that profit instead of interest<sup>7</sup>.

1 *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92; *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA. In earlier times the rate was 4%: *Hall v Hallet* (1784) 1 Cox Eq Cas 134 at 138; *Jones v Foxall* (1852) 15 Beav 388 at 392 per Romilly MR; *Imperial Mercantile Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189 at 209-210 per Lord Cairns LC. Compound interest may be awarded in the case of a breach of duty to accumulate: *Re Barclay, Barclay v Andrew* [1899] 1 Ch 674. As to the rate of interest on funds lodged in court see the Administration of Justice Act 1982 s 38(7); the Court Fund Rules 1987, SI 1987/821, Pt IV (rr 26-33) (as amended). As from a day to be appointed, the Supreme Court is renamed the Senior Courts by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see PARA 632 note 1 ante; and COURTS. At the date at which this volume states the law no such day had been appointed.

2 *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA. In *Re Evans, Evans v Westcombe* [1999] 2 All ER 777, 143 Sol Jo LB 72, a case involving the 'non-professional administrator of a small estate in times of more gentle inflation', 8% was awarded. See also *West v West* [2003] All ER (D) 17 (Jun), where the court awarded 1% over the special account rate.

3 *Re Emmet's Estate, Emmet v Emmet* (1881) 17 ChD 142.

4 *Mosley v Ward* (1805) 11 Ves 581; *Jones v Foxall* (1852) 15 Beav 388 at 392.

5 *Hall v Hallet* (1784) 1 Cox Eq Cas 134; *Re Hilliard* (1790) 1 Ves 89; *Raphael v Boehm* (1805) 11 Ves 92 (affd (1807) 13 Ves 407, 590); *Crackelt v Bethune* (1820) 1 Jac & W 586; *Brown v Sansome* (1825) M'Cle & Yo 427; *English v Willats* (1831) 1 LJ Ch 84; *Court v Robarts* (1839) 6 Cl & Fin 65, HL; *Hutchins v Hutchins* (1851) 15 Jur 869; *Jones v Foxall* (1852) 15 Beav 388 at 392; *Dobson v Pattinson* (1857) 5 WR 771; *Tyrrell v Bank of London* (1862) 10 HL Cas 26; *Burdick v Garrick* (1870) 5 Ch App 233; *Price v Price* (1880) 42 LT 626; *Gilroy v Stephens* (1882) 30 WR 745; *Re Jones, Jones v Searle* (1883) 49 LT 91; *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA; *Polish Steam Ship Co v Atlantic Maritime Co* [1985] QB 41, [1984] 3 All ER 59, CA; *Guardian Ocean Cargoes Ltd v Banca do Brasil SA (No 3)* [1992] 2 Lloyd's Rep 193. See also *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455; *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd (sued as Sovereign Chemicals Industries Ltd)* [2000] 3 All ER 493, CA.

6 *Wallersteiner v Moir (No 2)* [1975] QB 373 at 398, [1975] 1 All ER 849 at 864, CA, per Buckley LJ (compound interest is awarded not as a punishment but as a conventional measure of the profit deemed to be made; it is only ordered for breach of a fiduciary duty); *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 419, CA. But cf *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, where simple interest was awarded on money used in a joint venture benefiting the plaintiff as well as the defendant. See also *Williams v Powell* (1852) 15 Beav 461; *Re Davis, Davis v Davis* [1902] 2 Ch 314.

7     *Vyse v Foster* (1872) 8 Ch App 309 at 329 (affd (1874) LR 7 HL 318); *Re Davis, Davis v Davis* [1902] 2 Ch 314; *Gordon v Gonda* [1955] 2 All ER 762, [1955] 1 WLR 885, CA. See also PARA 1109 post.

## **UPDATE**

### **1108 Rate of interest**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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## **C. ACCOUNT OF PROFITS**

### **1109. Liability to account.**

Where a trustee makes a profit by an improper employment of trust money or property, he is liable to make good to the trust estate the amount of that profit in addition to the money or property improperly employed<sup>1</sup>. Where he makes a profit by improperly employing trust money in trade or speculation, he is liable at the beneficiary's option to account to the trust estate either for the profit actually made or for compound interest at one per cent above the clearing banks' base rate from time to time<sup>2</sup> on the amount of the trust money improperly employed<sup>3</sup>.

A beneficiary is not prevented from bringing an action for account against a trustee by the principle that a shareholder cannot recover in respect of a claim that is purely reflective of a company's loss<sup>4</sup> unless the trustee can show that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover<sup>5</sup>.

1 *Re Kempson, ex p Shakeshaft* (1791) 3 Bro CC 197 at 198; *Brown v De Tastet* (1819) Jac 284; *Wedderburn v Wedderburn* (1838) 4 My & Cr 41 at 54; *Lord v Wightwick* (1854) 23 LJ Ch 235 at 238; *Sugden v Crossland* (1856) 3 Sm & G 192 at 194 per Stuart V-C; *Bowes v Toronto City* (1858) 11 Moo PCC 463 at 517-518, PC; *Williams v Stevens* (1866) LR 1 PC 352; *Fleeming v Howden* (1868) LR 1 Sc & Div 372, HL; *Vyse v Foster* (1874) LR 7 HL 318 at 333-334 per Lord Cairns LC.

2 *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 419, CA. Interest is computed with yearly rests where trust property is employed in trade: *Piety v Stace* (1799) 4 Ves 620; *Heathcote v Hulme* (1819) 1 Jac & W 122; *Brown v Sansome* (1825) M'Cle & Yo 427; *Jones v Foxall* (1852) 15 Beav 388; *Penny v Avison* (1856) 3 Jur NS 62 at 63 per Wood V-C; *Re Davis, Davis v Davis* [1902] 2 Ch 314. However, yearly rests were not directed in *A-G v Solly* (1829) 2 Sim 518. See also Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 478 et seq.

3 *Anon* (1755) 2 Ves Sen 629; *Pocock v Reddington* (1801) 5 Ves 794 at 800; *Bate v Scales* (1806) 12 Ves 402; *Heathcote v Hulme* (1819) 1 Jac & W 122; *Docker v Somes* (1834) 2 My & K 655; *Robinson v Robinson* (1851) 1 De GM & G 247 at 256-257; *Jones v Foxall* (1852) 15 Beav 388; *Re Davis, Davis v Davis* [1902] 2 Ch 314. The beneficiary may not claim both interest and profits, nor interest for one part of the time during which the trust money has been improperly employed and profits in respect of the other part: *Pocock v Reddington* supra at 800 per Arden MR; *Heathcote v Hulme* supra at 132. A claim against a constructive trustee on account of the profits of a business must be pursued promptly: *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815.

4 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, [1982] 1 All ER 354, CA.

5 *Shaker v Al-Bedrawi, Shaker v Masry, Shaker v Steggles Palmer (a firm)* [2002] EWCA Civ 1452, [2003] Ch 350, [2002] 4 All ER 835. See also *Re Lucking's Will Trusts, Renwick v Lucking* [1967] 3 All ER 726, [1968] 1 WLR 866; *Walker v Stones* [2001] QB 902, [2000] 4 All ER 412, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/D. COSTS/1110. Liability for costs.

## **D. COSTS**

### **1110. Liability for costs.**

The ordinary right of a trustee to his costs of legal proceedings in relation to the trust to which he is a party<sup>1</sup> does not extend to proceedings instituted to remedy, or otherwise rendered necessary by, a breach of his duty as trustee<sup>2</sup>. He will normally be ordered to pay the costs of such proceedings where he commits a direct breach of trust<sup>3</sup>, or where he refuses or neglects to do his duty as trustee<sup>4</sup>.

1 *Bennett v Attkins* (1835) 1 Y & C Ex 247; *Baker v Carter* (1835) 1 Y & C Ex 250; *King v King* (1857) 1 De G & J 663; *Re Silver Valley Mines* (1882) 21 ChD 381 at 386, CA, per Jessel MR. See PARA 906 et seq ante.

2 *Parrot v Treby* (1705) Prec Ch 254; *Brown v How* (1740) Barn Ch 354; *Moore v Prance* (1851) 9 Hare 299; *Gresham v Price* (1865) 35 Beav 47; *Re Love, Hill v Spurgeon* (1885) 29 ChD 348 at 350, CA, per Cotton LJ. See also PARA 910 ante.

3 See eg *A-G v Hobert* (1676) Case temp Finch 259; *Haberdashers' Co v A-G* (1702) 2 Bro Parl Cas 370; *Seers v Hind* (1791) 1 Ves 294; *Piety v Stace* (1799) 4 Ves 620; *Crackelt v Bethune* (1820) 1 Jac & W 586; *Baker v Carter* (1835) 1 Y & C Ex 250 at 254 per Lord Lyndhurst CB; *Byrne v Norcott* (1851) 13 Beav 336; *Cook v Addison* (1869) LR 7 Eq 466; *Heugh v Scard* (1875) 33 LT 659; *Re Radclyffe, Pearce v Radclyffe, De Foe v Radclyffe* (1881) 50 LJ Ch 317; *Plowright v Lambert* (1885) 52 LT 646 at 655 per Field J; *Re Jones, Christmas v Jones* [1897] 2 Ch 190 at 197 per Kekewich J. A trustee is not protected in such circumstances by an express direction in the instrument of trust that he is to be allowed his costs: *Hide v Haywood* (1741) 2 Atk 126. The usual rule is that the defendant trustee pays only costs on the standard basis: *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92. No interest may be awarded on costs before they have been taxed because until then the trustee does not know what he has to pay: *Bartlett v Barclays Bank Trust Co Ltd (No 2)* supra; *Bowen-Jones v Bowen-Jones* [1986] 3 All ER 163, [1986] NLJ Rep 894.

4 See eg *Hertford Corpn v Hertford Poor* (1713) 2 Bro Parl Cas 377; *East v Ryal* (1725) 2 P Wms 284; *Caffrey v Darby* (1801) 6 Ves 488 at 497; *Taylor v Glanville* (1818) 3 Madd 176 at 178 per Leach V-C; *A-G v East Retford Corpn* (1833) 2 My & K 35 (revsd (1838) 3 My & Cr 484, 8 LJ Ch 49, 2 Jur 1079); *Willis v Hiscox* (1839) 4 My & Cr 197; *Man v Ricketts* (1844) 7 Beav 93; *Boulton v Beard* (1853) 3 De GM & G 608; *A-G v Murdoch* (1856) 2 K & J 571; *Smith v Bolden* (1863) 33 Beav 262; *Southwell v Martin* (1869) 21 LT 135; *Heugh v Scard* (1875) 33 LT 659; *Coppinger v Shekleton* (1885) 15 LR Ir 461; *Re Skinner, Cooper v Skinner* [1904] 1 Ch 289; *Re Ruddock, Newberry v Mansfield* (1910) 102 LT 89, CA. 'Costs' will include the costs of investigations by forensic accountants: *Alenco (Holdings) Ltd v Bates* [2005] EWHC 1540 (Ch), [2005] All ER (D) 211 (Jun).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/D. COSTS/1111. Relief in certain cases.

### 1111. Relief in certain cases.

In some cases the court considers it sufficient merely to deprive the trustee of his own costs of the proceedings<sup>1</sup>, and may decline to charge him with the costs of the other parties, even where it orders him to pay interest<sup>2</sup> in addition to refunding the principal lost by the breach of trust<sup>3</sup>.

A trustee may even be allowed his own costs, where his mistake was merely technical or slight or there are other extenuating circumstances<sup>4</sup>, or where the breach of trust has caused no loss to the trust estate or the loss has been made good before judgment in the proceedings<sup>5</sup>.

1 *Ball v Montgomery* (1793) 2 Ves 191 at 199; *O'Callaghan v Cooper* (1799) 5 Ves 117 at 128; *Knight v Martin* (1829) 1 Russ & M 70; *England v Downs* (1842) 6 Beav 269 at 279; *Devey v Thornton* (1851) 9 Hare 222 at 232; *Heugh v Scard* (1875) 33 LT 659; *Gurney v Gurney* (1883) 48 LT 529. The representative of a deceased trustee who has endangered the trust estate is not entitled to be paid out of the trust estate his costs of an action to remedy the breach of trust (*Gurney v Gurney* supra), but may be paid them only out of the estate of the deceased (*Haldenby v Spofforth* (1846) 9 Beav 195). However, see *Melling v Melling* (1857) 6 WR 121 (where the costs of the heir of a defaulting trustee incurred in an unsuccessful attempt to protect the trust property were allowed).

2 As to interest see PARAS 1106-1108 ante.

3 *Ashburnham v Thompson* (1807) 13 Ves 402 at 404 per Grant MR; *Tebbs v Carpenter* (1816) 1 Madd 290 at 308 per Plumer V-C; *Mousley v Carr* (1841) 4 Beav 49 at 53; *Knott v Cottee* (1852) 16 Beav 77. A trustee may even be allowed his costs in such a case: *Sammes v Rickman* (1792) 2 Ves 36; *Fitzgerald v O'Flaherty* (1828) 1 Mol 347; *Woodhead v Marriott* (1837) Coop Pr Cas 62; *Mousley v Carr* supra at 53; *Fozier v Andrews* (1845) 2 Jo & Lat 199; *Chugg v Chugg* [1874] WN 185; *Re Davis, Davis v Davis* [1902] 2 Ch 314. As to the costs of charity trustees see CHARITIES vol 8 (2010) PARAS 625-626.

4 *Parrot v Treby* (1705) Prec Ch 254; *Sammes v Rickman* (1792) 2 Ves 36; *Taylor v Tabrum* (1833) 6 Sim 281; *Bennett v Attkins* (1835) 1 Y & C Ex 247; *Baker v Carter* (1835) 1 Y & C Ex 250 (but see *Plowright v Lambert* (1885) 52 LT 646 at 655); *A-G v Caius College* (1837) 2 Keen 150; *Poole v Pass* (1839) 1 Beav 600; *Bailey v Gould* (1840) 4 Y & C Ex 221; *Harper v Munday, Horrocks v Munday* (1856) 2 Jur NS 1197; *Ryan v Nesbitt* [1879] WN 100; *Re Evans, Welch v Channell* (1884) 26 ChD 58 at 65, CA, per Cotton LJ. Where a trustee denied that he was indebted to the trust estate and on taking the accounts a small sum was found to be still owing to it from him, he was not on that account deprived of his costs: *Turner v Hancock* (1882) 20 ChD 303, CA.

5 *Fitzgerald v Pringle* (1825) 2 Mol 534; *Royds v Royds* (1851) 14 Beav 54; *Fitzgerald v Fitzgerald* (1856) 6 L Ch R 145; *Peacock v Colling* (1885) 54 LJ Ch 743 at 746, CA, per Cotton LJ. Cf *Birks v Micklethwait* (1864) 34 LJ Ch 362.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/D. COSTS/1112. Costs of innocent co-trustee.

### **1112. Costs of innocent co-trustee.**

The costs of an innocent co-trustee who has been made a co-defendant in proceedings for breach of trust may be ordered to be paid by the trustee who actually committed the breach<sup>1</sup>.

<sup>1</sup> *Lockhart v Reilly, Reilly v Lockhart* (1856) 25 LJ Ch 697; *Boynton v Richardson* (1862) 31 Beav 340; *Price v Price* (1880) 42 LT 626; *Re Linsley, Cattley v West* [1904] 2 Ch 785. Trustees may properly sever their defences where there are reasonable grounds for doing so (eg where allegations of fraud or improper conduct are made only against one trustee): *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745, [1966] 1 WLR 920.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(1) LIABILITY/(iii) Extent of Liability for Breach of Trust/D. COSTS/1113. Proceedings partly occasioned by breach of trust.

### **1113. Proceedings partly occasioned by breach of trust.**

Where proceedings are instituted or are carried on partly in reference to a breach of trust and partly for the general benefit of the trust estate, then, so far as the proceedings are unconnected with the breach of trust, a defaulting trustee is not ordered to pay the costs of them<sup>1</sup>, and may, if the court thinks fit, be allowed his own costs<sup>2</sup>.

<sup>1</sup> *Newton v Bennet* (1784) 1 Bro CC 359; *Talbot v Marshfield* (1868) 3 Ch App 622; *Easton v Landor* (1892) 2 R 176, CA. Cf *Westover v Chapman* (1844) 1 Coll 177 at 183; *Payne v Parker* (1869) 17 WR 640.

<sup>2</sup> *Sanderson v Walker*, *Campbell v Walker* (1807) 13 Ves 601 at 604; *Tebbs v Carpenter* (1816) 1 Madd 290 at 309; *Fitzgerald v Pringle* (1825) 2 Mol 534; *Pride v Fooks* (1840) 2 Beav 430; *Hewett v Foster* (1844) 7 Beav 348; *Heighington v Grant* (1845) 1 Ph 600; *Knott v Cottee* (1852) 16 Beav 77; *Rittson v Stordy* (1855) 1 Jur NS 771; *Bate v Hooper* (1855) 5 De GM & G 338 at 345; *Springett v Dashwood* (1860) 2 Giff 521; *Boynton v Richardson* (1862) 31 Beav 340; *Bell v Turner* (1877) 47 LJ Ch 75. See also PARA 910 ante. Costs occasioned by unfounded charges of fraud or wilful default made against trustees, or even the whole costs of the action in which they are made, fall upon the parties making such charges, and not upon the trustees, even though they have not acted strictly in accordance with their trust: *Passingham v Sherborn* (1846) 9 Beav 424; *Bartlett v Wood* (1861) 30 LJ Ch 614; *Massey v Massey* (1867) 17 LT 233.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(i) Exemption under a Provision in the Trust Instrument/1114. Exemption clauses.

## **(2) EXEMPTION AND RELIEFS**

### **(i) Exemption under a Provision in the Trust Instrument**

#### **1114. Exemption clauses.**

The efficacy of a trustee exemption clause can be regarded as firmly established<sup>1</sup>. It is not contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to that effect. A trustee who prepares the trust instrument is not prevented from relying on an exemption clause included in it<sup>2</sup>. Where there is a doubt on the construction of a trust whether a trustee would be exempted from liability for breach of trust by a trustee exemption clause, such doubt should be resolved against the trustee and the clause construed so as not to protect him<sup>3</sup>. It appears that the provisions of the Unfair Contract Terms Act 1977 do not apply to trustee exemption clauses<sup>4</sup>. However, there are statutory provisions which may affect trustee exemption clauses in the context of financial services<sup>5</sup>, companies<sup>6</sup> and pensions<sup>7</sup>.

The Law Commission has considered the question of whether there should be statutory regulation of trustee exemption clauses<sup>8</sup>, but in its final report it decided against statutory regulation in favour of a rule of practice<sup>9</sup>.

1 *Armitage v Nurse*[1998] Ch 241, [1997] 2 All ER 705, CA. In this case, a clause in a settlement provided that no trustee should be liable for any loss or damage to the fund or its income 'unless such loss or damage shall be caused by his own actual fraud'. It was held that the clause was effective no matter how indolent, imprudent, lacking in diligence, negligent or wilful he might have been, so long as he had not acted dishonestly; the clause was not repugnant to the trust; a clause which purported to exclude liability for dishonesty and lack of good faith would be repugnant as it would derogate from the irreducible core of obligations of honesty and good faith: *Armitage v Nurse* supra at 253 and 713 per Millett LJ.

For the meaning of dishonesty see *Walker v Stones*[2001] QB 902, [2000] 4 All ER 412, CA; and PARA 704 ante. In *Woodland-Ferrari v UCL Group Retirement Benefits Scheme*[2002] EWHC 1354 (Ch), [2003] Ch 115, [2002] 3 All ER 670, wilful default was held not to be the same as fraudulent breach of trust.

For earlier decisions see: *Birls v Betty* (1821) 6 Madd 90; *Wilkins v Hogg* (1861) 10 WR 47, CA; *Pass v Dundas* (1880) 43 LT 665. The indemnity clause usually inserted in settlements and wills does not, however, protect a trustee against a breach of trust committed by himself: *Mucklow v Fuller* (1821) Jac 198; *Fenwick v Greenwell* (1847) 10 Beav 412; *Drosier v Brereton* (1851) 15 Beav 221; *Dix v Burford* (1854) 19 Beav 409; *Brumridge v Brumridge* (1858) 27 Beav 5; *Rehden v Wesley* (1861) 29 Beav 213; *Eaves v Hickson* (1861) 30 Beav 136.

2 *Bogg v Raper* (1998) 1 ITLR 267, (1998) Times, 22 April, CA. In this case, it was held that the mere fact that the person named as a trustee was the draftsman of the trust instrument is not sufficient to make an exculpatory provision ineffective; but it is, of course, otherwise if the draftsman inserted the provision without calling the settlor's attention to it and knowing that the settlor did not realise its effect: *Bogg v Raper* supra at 287 per Millett LJ.

3 *Wight v Olswang*(1998) Times, 17 September; revsd on a question of construction without affecting this point (1999) Times, 18 May, CA. In this case, it was held, and affirmed on the appeal, that where a settlement had two trustee exemption clauses, one protecting all trustees from liability for breach of trust and one which expressly did not apply to paid trustees, then paid trustees could not rely on the general exemption.

4 *Baker v JE Clark & Co*[2006] EWCA Civ 464, [2006] All ER (D) 337 (Mar). See also *Trustee Exemption Clauses* (Law Com no 301) (2006) (Cm 6874) PARA 2.26.

5 Any clause purporting to exempt the manager or trustee of an authorised unit trust scheme (as defined in the Financial Services and Markets Act 2000 237(3): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603) from liability for any failure to exercise due care and diligence is void: see s 253; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 611.

6 Any provision purporting to exempt or indemnify a trustee of a debenture trust deed who has failed to show the degree of care and diligence required of him as trustee is void: see the Companies Act 1985 s 192 (prospectively repealed); the Companies Act 2006 s 750 (not yet in force); and COMPANIES vol 15 (2009) PARA 1311.

Any provision, whether contained in the company's articles or in any contract, purporting to exempt any person employed by the company as auditor from liability in respect of breach of trust in relation to the company is void: see the Companies Act 1985 s 310 (prospectively repealed); the Companies Act 2006 s 532 (not yet in force); and COMPANIES vol 15 (2009) PARA 951. This provision creates an inequality between incorporated and non-incorporated charities: see *Trustee Exemption Clauses* (Law Com no 301) (2006) (Cm 6874) PARA 2.36.

7 Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions by a trustee of the scheme or by a person to whom the function has been delegated under the Pensions Act 1995 s 34 cannot be excluded or restricted by any instrument or agreement: see s 33(1); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 803.

8 *Trustees' Powers and Duties* (Law Com no 260) (1999).

9 *Trustee Exemption Clauses* (Law Com no 301) (2006) (Cm 6874) PARA 7. The Commission recommended that the main elements of the rule should be: (1) any paid trustee who causes a settlor to include a clause in a trust instrument which has the effect of excluding or limiting liability for negligence must before the creation of the trust take such steps as are reasonable to ensure that the settlor is aware of the meaning and effect of the clause; (2) regulatory and professional bodies should make regulation to such effect in order to meet the particular circumstances of their membership and should enforce such regulation in accordance with their codes of conduct, and bodies whose membership includes the drafters of trusts should extend regulation to those who draft trust documentation containing trustee exemption provisions; (3) the government should promote the application of this rule of practice as widely as possible across the trust industry: *Trustee Exemption Clauses* (Law Com no 301) (2006) (Cm 6874) PARAS 7.2-7.4. Rules to such effect have been made: see *Practice Rules to the Trustee Exemption Clauses*, made by the Society of Trust and Estate Practitioners.

## UPDATE

### 1114 Exemption clauses

NOTE 6--Companies Act 2006 ss 532, 750 both in force on 6 April 2008: SI 2007/3495.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/ (ii) Statutory Exemptions/1115. Limitation of trustee's liability to his own defaults.

## **(ii) Statutory Exemptions**

### **1115. Limitation of trustee's liability to his own defaults.**

The Trustee Act 2000 contains extensive provisions relating to the employment of agents, nominees and custodians<sup>1</sup>. A trustee is not liable for any act or default of an agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him<sup>2</sup> when entering into the arrangement under which the person acts<sup>3</sup> or carrying out his continuing duties in relation to the arrangement<sup>4</sup>.

1 Trustee Act 2000 Pt IV (ss 11-27). The new rules apply to trusts created both before and after the commencement of the Act (ie 1 February 2001) (s 27) and are in addition to any powers conferred otherwise than by the Act (s 26(a)) but subject to any restrictions imposed by the trust instrument or any other legislation (s 26(b)).

2 Ibid ss 1, 2, Sch 1 para 3. See PARA 949 ante.

3 Ibid s 23. See PARA 988 et seq ante.

4 Ibid s 23. See PARA 994 et seq ante.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/ (ii) Statutory Exemptions/1116. Adoption of the Law of Property Act 1925.

### **1116. Adoption of the Law of Property Act 1925.**

Whether acting with or without a solicitor<sup>1</sup>, trustees and other persons in a fiduciary position are not guilty of neglect or breach of duty, and do not become in any way liable, by reason of the omission in good faith on the part of themselves or their solicitor to negative, in any instrument or in connection with any contract or transaction, any of the powers, covenants, provisions, stipulations or words given, included, implied or made applicable by the Law of Property Act 1925<sup>2</sup>, or by reason of the omission to insert or apply any others in place of them, in any case where the provisions of that Act would allow of their or his doing so<sup>3</sup>.

1 For these purposes, any reference to a solicitor is to be construed as including: (1) a reference to a licensed conveyancer (see LEGAL PROFESSIONS vol 66 (2009) PARA 1319 et seq) or to a recognised body providing conveyancing services (see LEGAL PROFESSIONS vol 66 (2009) PARA 1392 et seq) and any reference to a person's solicitor is to be construed as including a reference to a licensed conveyancer or a recognised body acting for that person (see the Administration of Justice Act 1985 s 34(2)(a)); and (2) a reference to a recognised body (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq) and any reference to a person's solicitor is to be construed as including a reference to a recognised body acting for that person (s 9(6), Sch 2 para 37(a)).

2 As to these powers and provisions see eg DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236; MORTGAGE vol 77 (2010) PARA 443 et seq; SALE OF LAND vol 42 (Reissue) PARAS 293, 338, 349.

3 See the Law of Property Act 1925 s 182(1), (3), (4). See also MORTGAGE vol 77 (2010) PARA 179; LEGAL PROFESSIONS vol 66 (2009) PARA 823. Save as expressly provided by the Law of Property Act 1925, nothing in that Act is to be taken to imply that the insertion in any instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations or words is improper: s 182(2).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/ (ii) Statutory Exemptions/1117. Investing on authorised but insufficient security.

### **1117. Investing on authorised but insufficient security.**

The protection formerly available to a trustee who advanced too much trust money on a mortgage security, which would at the time of the investment have been a proper investment in all respects for a smaller sum, is not available for advances made after the coming into force of the Trustee Act 2000<sup>1</sup>. However, the protection continues for advances made before that date<sup>2</sup>.

1 See the Trustee Act 1925 s 9(1), (2) (repealed with savings: see PARA 1017 ante). See also PARA 1030 ante. As to the commencement of the Trustee Act 2000 see PARA 603 note 9 ante.

2 Ibid s 40(2), Sch 3 para 3.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iii) Concurrence or Condonation by Beneficiaries/1118. Effect of concurrence or acquiescence.

### (iii) Concurrence or Condonation by Beneficiaries

#### 1118. Effect of concurrence or acquiescence.

Beneficiaries<sup>1</sup> who actively concur or passively acquiesce without original concurrence in a breach of trust can obtain no relief against the trustee in respect of it<sup>2</sup> if at the time of their concurrence or acquiescence they were of full age<sup>3</sup> and under no incapacity<sup>4</sup>, were not acting under undue influence<sup>5</sup> and were fully informed of the circumstances<sup>6</sup>. Assent to a breach of trust may be given by a beneficiary entitled in reversion<sup>7</sup>, but a person who becomes the administrator of a beneficiary is not as such bound by his previous personal acquiescence in the breach<sup>8</sup>. The concurrence of the beneficiary in the breach need not be expressed in writing<sup>9</sup>.

A person who actively concurs in the division of a trust fund in ignorance that he has himself an interest in it and that the division is a breach of trust cannot afterwards make the trustee liable for the amount of his interest in it<sup>10</sup>. A person claiming under a beneficiary stands in the same position as the beneficiary himself<sup>11</sup>.

1 In charitable trusts it seems that only the Attorney General can effectively consent to or acquiesce in a breach of trust: *Re Freeston's Charity, Sylvester v University College, Oxford*[1978] 1 All ER 481 at 490, [1978] 1 WLR 120 at 129-130; affd [1979] 1 All ER 51, [1978] 1 WLR 741, CA. In the case of a charitable trust the Attorney General and the Charity Commission have power in certain circumstances to authorise the payment of an ex gratia payment which is not within the terms of the trust: see CHARITIES vol 8 (2010) PARAS 421-423. In the case of a derivative action the test to be applied in determining whether a shareholder's acquiescence in what happened was sufficient to disentitle the shareholder from claiming against a director for breach of fiduciary duty is the same test as that applicable in the analogous case of a beneficiary's acquiescence in a breach of trust: see *Knight v Frost*[1999] 1 BCLC 364 at 375 per Hart J.

2 *Brice v Stokes* (1805) 11 Ves 319 at 325-326 per Lord Eldon LC; *Walker v Symonds* (1818) 3 Swan 1 at 64; *Byrchall v Bradford* (1821) 6 Madd 13; *Nail v Punter* (1832) 5 Sim 555; *Lincoln v Wright* (1841) 4 Beav 427 at 432 per Lord Langdale MR; *Stretton v Ashmall* (1854) 3 Drew 9; *Re Biddulph, ex p Barnewall, Countess De Front's Executors' Case* (1855) 6 De GM & G 801 at 812; *Hope v Liddell, Liddell v Norton* (1855) 21 Beav 183 at 210; *Re M'Kenna's Estate, ex p Busteed* (1861) 5 LT 241, CA; *Butler v Carter*(1868) LR 5 Eq 276 at 281 per Lord Romilly MR; *Sleeman v Wilson*(1871) LR 13 Eq 36; *Phipps v Boardman*[1964] 2 All ER 187, [1964] 1 WLR 993 (no appeal on this point); *Allan v Rea Brothers Trustees Ltd*[2002] EWCA Civ 85, 4 ITELR 627. See also PARAS 1131-1133 post. As to the effect of acquiescence in equity generally see EQUITY vol 16(2) (Reissue) PARA 909. A beneficiary who consents to a breach of trust cannot claim against the trustee in respect of it under cover of the non-concurrence of other beneficiaries: *Fletcher v Collis*[1905] 2 Ch 24 at 32 et seq, CA, per Romer LJ. The principle that the beneficiary cannot complain of a breach of trust to which he was party does not preclude a corporation from seeking relief against a fraudulent and illegal use of its powers by certain of its members to deprive it of property to which it was by law entitled: *A-G v Wilson* (1840) Cr & Ph 1 at 23 per Lord Cottenham LC. See also *Belmont Finance Corp'n Ltd v Williams Furniture Ltd*[1979] Ch 250, [1979] 1 All ER 118, CA; *Belmont Finance Corp'n v Williams Furniture Ltd (No 2)*[1980] 1 All ER 393, CA.

3 *Adye v Feuillateau* (1783) 3 Swan 84n at 87n-88n per Lord Loughborough LC; *Wilkinson v Parry* (1828) 4 Russ 272 at 276; *March v Russell* (1837) 3 My & Cr 31 at 42. See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1410. The protection of the court in relation to minors is continued after they have attained full age until they have acquired all the information which they might have had if they had been all along of mature years: *Walker v Symonds* (1818) 3 Swan 1 at 69 per Lord Eldon LC.

4 *Crosby v Church* (1841) 3 Beav 485 at 489; *Mara v Manning* (1845) 2 Jo & Lat 311 at 318; *Cresswell v Dewell* (1863) 4 Giff 460 at 465; *Fletcher v Green* (1864) 33 Beav 426 at 429; *Fletcher v Collis*[1905] 2 Ch 24 at 31-32, CA, per Vaughan Williams LJ.

5 *Lloyd v Attwood, Attwood v Lloyd* (1859) 3 De G & J 614 at 649 per Turner LJ. See also EQUITY vol 16(2) (Reissue) PARAS 417, 426; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. If a trustee knows or ought to know that the beneficiary was acting under the undue influence of another person, the beneficiary's consent or acquiescence is no defence: *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co*[1964] Ch 303, [1963] 3 All ER 1, CA.

6 *Ryder v Bickerton* (1743) 3 Swan 80n at 83n; *Walker v Symonds* (1818) 3 Swan 1 at 69, 73; *Adams v Clifton* (1826) 1 Russ 297; *March v Russell* (1837) 3 My & Cr 31 at 42-43; *Fyler v Fyler* (1841) 3 Beav 550 at 560 per Lord Langdale MR; *Burrows v Walls* (1855) 5 De GM & G 233 at 251-252 per Lord Cranworth LC; *Thompson v Finch* (1856) 8 De GM & G 560 at 566; *Bullock v Downes* (1860) 9 HL Cas 1 at 19; *Rehden v Wesley* (1861) 29 Beav 213 at 215 per Romilly MR; *Westmoreland v Holland* (1871) 23 LT 797 at 799 per Stuart V-C; *Dixon v Dixon*(1878) 9 ChD 587; *Re Jackson, Wilson v Donald* (1881) 44 LT 467; *Crichton v Crichton*[1896] 1 Ch 870 at 875, CA, per Lindley LJ. In the case of a person of full age there may be a prima facie presumption that he is acting with a full knowledge of all the circumstances: *Sawyer v Sawyer*(1855) 28 ChD 595 at 604, CA, per Fry LJ. See also *John v James* [1991] FSR 397 at 439 per Nicholls J.

7 *Life Association of Scotland v Siddal, Cooper v Greene* (1861) 3 De GF & J 58 at 73 per Turner LJ.

8 *Re Clarke, ex p Smith* (1841) 2 Mont D & De G 113.

9 *Macleod v Annesley* (1853) 16 Beav 600 at 607; *Fletcher v Collis*[1905] 2 Ch 24 at 33, CA.

10 *Evans v Benyon*(1887) 37 ChD 329 at 344, CA, per Cotton LJ. As to the right to recover overpayments from a beneficiary where the trustee is also a beneficiary see PARA 1133 post.

11 *Williams v Lomas* (1852) 16 Beav 1; *Brewer v Swirles* (1854) 2 Sm & G 219; *Fletcher v Collis*[1905] 2 Ch 24, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iii) Concurrence or Condonation by Beneficiaries/1119. Nature of consent.

### 1119. Nature of consent.

Where a beneficiary sues in respect of a breach of trust, then, if his consent or concurrence is relied on as a defence to his proceedings, the court has to consider all the circumstances with a view to deciding whether it is fair and equitable<sup>1</sup> that he should sue the trustees; but it is not necessary for the purpose of protecting them that the beneficiary should have known that it was a breach of trust in which he concurred, if he fully understood in what he concurred<sup>2</sup>, nor is it necessary that he himself should have benefited from the breach<sup>3</sup>. There is no hard and fast rule that ignorance of a legal right prevents an effective consent being given, but all the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee<sup>4</sup>. There must be a full and frank disclosure so that the beneficiary is put fully in the picture<sup>5</sup>.

1 Although the court can consider all the circumstances, the inquiry is concerned with the requisite degree of knowledge. There is no principle of the law of contract or trusts which makes a release ineffective simply because it is unfair: *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch) at [187], [2002] 3 All ER 17 at [187], 4 ITELR 729 at [187] per Lawrence Collins J.

2 See *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 730, [1962] 1 WLR 86 at 108 per Wilberforce J; on appeal (where no opinion was expressed on this point) [1964] Ch 303, [1963] 3 All ER 1, CA. This point was approved in *Holder v Holder* [1968] Ch 353 at 394, 399, 406, [1968] 1 All ER 665 at 673, 678, 683, CA; and in *Re Freeston's Charity, Sylvester v University College, Oxford* [1979] 1 All ER 51 at 62, [1978] 1 WLR 741 at 754, CA.

3 *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 730, [1962] 1 WLR 86 at 108; on appeal [1964] Ch 303, [1963] 3 All ER 1, CA. See note 2 supra. See also *Chillingworth v Chambers* [1896] 1 Ch 685 at 700, CA, per Lindley LJ; *Fletcher v Collis* [1905] 2 Ch 24 at 32 et seq, CA, per Romer LJ.

4 *Holder v Holder* [1968] Ch 353 at 394, [1968] 1 All ER 665 at 673, CA; *Re Freeston's Charity* [1979] 1 All ER 51 at 62, [1978] 1 WLR 741 at 754, CA. Even where a beneficiary is not precluded from suing the trustees by his consent at the time of the transaction, he may be precluded from doing so on the ground of acquiescence, if by his conduct after he has properly appreciated the position he has done anything which is equivalent to a release of his claims or on which an estoppel may be found against him: see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 735-736, [1962] 1 WLR 86 at 115-116; on appeal [1964] Ch 303, [1963] 3 All ER 1, CA. See also *Re Jarvis, Edge v Jarvis* [1958] 2 All ER 336, [1958] 1 WLR 815; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; *Swain v Law Society* [1981] 3 All ER 797, [1982] 1 WLR 17, CA (revsd without affecting this point [1983] 1 AC 598, [1982] 2 All ER 827, HL); *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old and Campbell Ltd v Liverpool Friendly Society* [1982] QB 133n, [1981] 1 All ER 897. See also PARA 1118 ante.

5 *Phipps v Boardman* [1964] 2 All ER 187, [1964] 1 WLR 993 (no appeal on this point).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iii) Concurrence or Condonation by Beneficiaries/1120. Effect of condonation.

## 1120. Effect of condonation.

A trustee is relieved from liability in respect of a breach of trust if he is released or indemnified by all the beneficiaries or other persons entitled to enforce the liability<sup>1</sup>, provided that they are of full age<sup>2</sup> and under no incapacity, and are not acting under undue influence<sup>3</sup> and have full information as to all material circumstances connected with the breach of trust<sup>4</sup>. Where all do not join in the release, those who join are precluded from enforcing the liability<sup>5</sup> unless they only joined on the understanding that all should join<sup>6</sup>. A release of one of several trustees may operate to release the others also<sup>7</sup>.

1 *Stackhouse v Barnston* (1805) 10 Ves 453 at 466 per Grant MR; *Williams v Lomas* (1852) 16 Beav 1; *Farrant v Blanchford* (1863) 1 De GJ & Sm 107 at 119-120 per Lord Westbury LC; *Aveline v Melhuish* (1864) 2 De GJ & Sm 288; *Evans v Benyon* (1887) 37 ChD 329 at 342, CA, per Cotton LJ. See also PARAS 1059, 1084 ante; and EQUITY vol 16(2) (Reissue) PARAS 906-908. A beneficiary may not proceed against a trustee for a breach of trust after accepting a benefit on the express condition that he is to refrain from doing so: *Egg v Devey* (1847) 10 Beav 444.

2 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 12 et seq, 23. A minor who fraudulently consents to a breach of trust cannot later bring a claim against the trustee in respect of it: *Overton v Banister* (1844) 3 Hare 503. A release executed by a person immediately after attaining his majority is viewed with suspicion: *Wade v Cox* (1835) 4 LJ Ch 105; *Parker v Bloxam* (1855) 20 Beav 295.

3 *Bowles v Stewart* (1803) 1 Sch & Lef 209 at 226-227; *Lloyd v Attwood*, *Attwood v Lloyd* (1859) 3 De G & J 614 at 649; *Farrant v Blanchford* (1863) 1 De GJ & Sm 107 at 119-120 per Lord Westbury LC; *Reade v Reade* (1881) 9 LR Ir 409, Ir CA. See also PARA 1118 note 5 ante.

4 *Walker v Symonds* (1818) 3 Swan 1; *Hore v Becher* (1842) 12 Sim 465; *Stanes v Parker* (1846) 9 Beav 385; *Aspland v Watte* (1855) 20 Beav 474; *Lloyd v Attwood*, *Attwood v Lloyd* (1859) 3 De G & J 614 at 649-650; *Farrant v Blanchford* (1863) 1 De GJ & Sm 107 at 119-120; *Thomson v Eastwood* (1877) 2 App Cas 215 at 233-234, HL; *Reade v Reade* (1881) 9 LR Ir 409, Ir CA; *Re Garnett*, *Gandy v Macaulay* (1885) 31 ChD 1, CA. As to the advisability of the beneficiary having independent legal advice see *Re Pauling's Settlement Trusts*, *Youngehusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA.

5 *Aylwin v Bray* (1822) cited in 2 Y & J at 518n; *Morley v Lord Hawke* (circa 1801) cited in 2 Y & J 520; *Bather v Kearsley* (1844) 7 Beav 545.

6 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 62.

7 *Blackwood v Borrowes* (1843) 4 Dr & War 441.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iii) Concurrence or Condonation by Beneficiaries/1121. Condonation by conduct.

### **1121. Condonation by conduct.**

The relief of a trustee from liability by the beneficiary's conduct is governed by the same principles as relief by actual release<sup>1</sup>. A beneficiary who, knowing of a breach of trust, obtains from the trustee part only of the trust property to which he is entitled does not thereby lose his right to a further claim against the trustee in respect of the rest of the property unless an intention to abandon that right can be gathered from the surrounding circumstances<sup>2</sup>.

1 *French v Hobson* (1803) 9 Ves 103.

2 *Re Cross, Harston v Tenison* (1882) 20 ChD 109 at 122, CA.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iv) Relief by the Court/1122. Breach excused by ignorance of facts.

#### **(iv) Relief by the Court**

##### **1122. Breach excused by ignorance of facts.**

Where a trustee commits what is in itself a breach of trust through ignorance of a fact which he could not with due diligence have ascertained, he may be relieved from liability for the breach<sup>1</sup>; but it seems that any inherent jurisdiction is now in practice superseded by the statutory provisions<sup>2</sup>.

1 *Re Biddulph, ex p Norris*(1869) 4 Ch App 280 at 287 per Giffard LJ.

2 See the Trustee Act 1925 s 61; and PARA 1123 post.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(iv) Relief by the Court/1123. Relief for honest and reasonable conduct.

### 1123. Relief for honest and reasonable conduct.

If it appears to the court<sup>1</sup> that a trustee<sup>2</sup>, whether appointed by the court or otherwise, is or may be<sup>3</sup> personally liable for a breach of trust, but has acted honestly<sup>4</sup> and reasonably<sup>5</sup> and ought fairly<sup>6</sup> to be excused for the breach<sup>7</sup> and for omitting to obtain the court's directions in the matter in which he committed the breach<sup>8</sup>, the court may relieve him either wholly or partly from personal liability for the breach<sup>9</sup>. To have acted reasonably a trustee must at least have acted as an ordinary man of business would act in his own affairs<sup>10</sup>, but the fact that he has so acted may not be sufficient to constitute reasonable conduct<sup>11</sup>. In the case of an investment on mortgage the requirements of the Trustee Act 1925<sup>12</sup> constitute a standard of reasonable conduct, although non-compliance with them is not necessarily unreasonable<sup>13</sup>.

1 For the meaning of 'the court' see PARA 632 note 3 ante.

2 'Trustee' is defined by the Trustee Act 1925 s 68(17) so as to include the duties incident to the office of a personal representative and, where the context admits, a personal representative.

3 The words 'or may be' cover cases of doubtful construction: *Re Grindey, Clews v Grindey* [1898] 2 Ch 593, CA. The court need not decide whether or not the liability in fact exists: *Re Mackay, Griessemann v Carr* [1911] 1 Ch 300 at 306 per Parker J.

4 See *Re Stuart, Smith v Stuart* [1897] 2 Ch 583 at 590. See also *Walker v Stones* [2001] QB 902, [2000] 4 All ER 412, CA; and PARA 704 ante. One of several trustees acts honestly notwithstanding that he may have failed to prevent his co-trustee from acting dishonestly: *Re Smith, Hands v Andrews* [1893] 2 Ch 1 at 18, CA.

5 See note 10 infra.

6 'Fairly' means in fairness to himself and to other people who may be affected: *Marsden v Regan* [1954] 1 All ER 475 at 481, [1954] 1 WLR 423 at 434, CA, per Evershed MR.

7 See *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373 at 380-381, PC (where it was said that it was not sufficient merely to show honesty and reasonableness, and that the position of a company performing the duties of a trustee for reward was different from that of an ordinary trustee). Cf *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151 at 164-165, CA, per Lawrence LJ; and see *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 at 1055 (where Harman J said that a paid trustee was expected to exercise a higher standard of diligence and knowledge than an unpaid trustee); *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 534, [1980] 1 All ER 139 at 152 (where Brightman J said that a higher duty of care is plainly due from a professional paid corporate trustee and refused relief on the basis that the defendant bank had not acted reasonably as it would not be fair to excuse it at the expense of the beneficiaries). The view to be taken in each case depends on its own circumstances: *Re Turner, Barker v Ivimey* [1897] 1 Ch 536 at 542 per Byrne J; *Re Kay, Mosley v Kay* [1897] 2 Ch 518 at 524 per Romer J. A trustee has been held not to be entitled to be excused by the breach having occurred through the fraud of his solicitor: *Davis v Hutchings* [1907] 1 Ch 356; but see *Re Smith, Smith v Thompson, Smith v Smith* (1902) 71 LJ Ch 411.

8 *Re Kay, Mosley v Kay* (1897) 2 Ch 518 at 524; *Re Grindey, Clews v Grindey* [1898] 2 Ch 593, CA; *Perrins v Bellamy* [1899] 1 Ch 797, CA.

9 Trustee Act 1925 s 61. See *Re Roberts, Knight v Roberts* (1897) 76 LT 479, CA (debt not recovered by executor); *Singlehurst v Tapscott Steamship Co Ltd (No 2)* [1899] WN 133, CA; *Re Houghton, Hawley v Blake* [1904] 1 Ch 622 at 626 (compromise of claim of co-executor); *Re Allsop, Whittaker v Bamford* [1914] 1 Ch 1, CA (income paid under advice of solicitor to a person not entitled); *Re Pawson's Settlement, Higgins v Pawson* [1917] 1 Ch 541 (payment of income to mortgagor after notice by mortgagee of mortgage); *Re Evans* [1999] 2 All ER 777. Cf *Williams v Byron* (1901) 18 TLR 172 (payment of funds to a solicitor for investment held unreasonable); *Prudential Assurance Co Ltd, Petitioners* 1952 SLT 121 (Scottish court refused to sanction

retrospectively a sale by trustees administering an English trust of heritage in Scotland which the trustees had had no power to effect). The Trustee Act 1925 s 61 does not authorise the court to relieve a trustee in advance from liability for a contemplated breach of trust: *Re Tollemache* [1903] 1 Ch 457 at 465-466 per Kekewich J; and see *Re Rosenthal, Schwarz v Bernstein* [1972] 3 All ER 552, [1972] 1 WLR 1273. The mere fact that a trustee has acted throughout on a solicitor's advice will not automatically result in relief being given (*Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423, CA); nor that counsel's advice was obtained (*Baden Delvaux & Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1983] BCLC 325). See also *Guinness plc v Saunders* [1988] BCLC 43 (where Browne-Wilkinson V-C doubted whether there was an absolute rule that a trustee who had retained part of the trust estate cannot be relieved from liability); on appeal [1988] 2 All ER 940, [1988] 1 WLR 863, CA; affd on other grounds [1990] 2 AC 663, [1990] 1 All ER 652, HL. As to the relief of personal representatives from liability see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 806-807. Where officers of a company are being proceeded against for breach of duty, the court has powers similar to those applying in relation to trustees: see COMPANIES vol 14 (2009) PARA 600.

10 *Re Turner, Barker v Ivimey* [1897] 1 Ch 536 at 542; *Re Stuart, Smith v Stuart* [1897] 2 Ch 583 at 590; *Re Dive, Dive v Roebuck* [1909] 1 Ch 328 at 343-344; *Shaw v Cates* [1909] 1 Ch 389 at 405; *Re Mackay, Griessemann v Carr* [1911] 1 Ch 300 at 306; *Ward-Smith v Jebb* (1864) 108 Sol Jo 919. Ignorance of the law does not of itself preclude a trustee from relief under the Trustee Act 1925 s 61: see *Holland v German Property Administrator* [1937] 2 All ER 807, CA. Where trustees had acted throughout in good faith and in accordance with the generally held view of the law, supported by judicial authority until that authority was overruled by the House of Lords, they were held to have acted honestly and reasonably and to be fairly entitled to be excused: *Re Wightwick's Will Trusts, Official Trustees of Charitable Funds v Fielding-Ould* [1950] Ch 260 at 266, [1950] 1 All ER 689 at 692 per Wynn-Parry J.

11 *Re Barker, Ravenshaw v Barker* (1898) 77 LT 712; *Re Lord De Clifford's Estate, Lord De Clifford v Quilter, Lord De Clifford v Marquis of Lansdowne* [1900] 2 Ch 707 at 716 per Farwell J. As to what is reasonable conduct generally see *Wynne v Tempest* [1897] 1 Ch 110; *Re Grindey, Clews v Grindey* [1898] 2 Ch 593 at 601, CA, per Chitty LJ; *Perrins v Bellamy* [1899] 1 Ch 797, CA; *Re Mackay, Griessemann v Carr* [1911] 1 Ch 300; *Re Allsop, Whittaker v Bamford* [1914] 1 Ch 1, CA; *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558; *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA (where improper exercises of a power of advancement were held to have been made honestly but not reasonably in view of legal advice received by the trustees). The burden of proving honesty and reasonableness lies upon the trustee: *Re Stuart, Smith v Stuart* [1897] 2 Ch 583 at 590 per Stirling J. Cf *Re Kirbys Coaches Ltd* [1991] BCLC 414.

12 In the Trustee Act 1925 s 8 (repealed, without affecting the operation of s 8 in relation to loans or investments made before the coming into force of the repeal: see the Trustee Act 2000 s 40, Sch 3; and PARAS 1029-1030 ante).

13 *Re Stuart, Smith v Stuart* [1897] 2 Ch 583 at 591-592; *Waite v Parkinson* (1901) 85 LT 456. See also *Chapman v Browne* [1902] 1 Ch 785, CA; *Re Dive, Dive v Roebuck* [1909] 1 Ch 328; *Shaw v Cates* [1909] 1 Ch 389; *Palmer v Emerson* [1911] 1 Ch 758.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(v) Lapse of Time/1124. Fraud by trustee.

## (v) Lapse of Time

### 1124. Fraud by trustee.

No statutory period of limitation applies to a claim by a beneficiary under a trust<sup>1</sup> against a trustee, being a claim in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy<sup>2</sup>. The position is the same where the claim is made against a fiduciary in breach of fiduciary duty<sup>3</sup> in respect of any fraud<sup>4</sup>.

1 For the meanings of 'trust' and 'trustee' see the Trustee Act 1925 s 68 para (17); and PARA 601 note 3 ante (applied by virtue of the Limitation Act 1980 s 38). It is important to ascertain whether or not there is a true trust relationship: see *PARAGON Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400 at 408-409, CA, where Millett LJ distinguished between: (1) those cases where the defendant, though not expressly appointed a trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust; and (2) cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the claimant. In the first class of cases the defendant really is a trustee; in the second he is not, and he is liable to account to the claimant (dicta of the Court of Appeal of the Isle of Man (the Staff of Government Division of the High Court) in *Barlow Clowes International Ltd v Eurotrust International Ltd* (1998) 2 IFLR (ITELR) 42 doubted). See also *Taylor v Davies*[1920] AC 636, PC; *Coulthard v Disco Mix Club Ltd*[1999] 2 All ER 457, [2000] 1 WLR 707; *JJ Harrison (Properties) Ltd v Harrison*[2001] EWCA Civ 1467, [2002] 1 BCLC 162; *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)*[2003] EWCA Civ 1048, [2004] 1 BCLC 131. For circumstances in which an executor de son tort may be held to be a constructive trustee see *James v Williams*[2000] Ch 1, [1999] 3 All ER 309, CA.

In cases where the defendant is according to Millett LJ's classification supra not 'really' a trustee, a limitation period will be imposed by analogy: see PARA 1127 post.

2 See the Limitation Act 1980 s 21(1)(a); and LIMITATION PERIODS vol 68 (2008) PARA 1140. Fraud or fraudulent breach of trust requires dishonesty: *Armitage v Nurse*[1998] Ch 241 at 260, [1997] 2 All ER 705 at 716, CA, per Millett LJ (relying on *Beaman v ARTS Ltd*[1949] 1 KB 550 at 558 per Lord Greene MR).

3 For guidance on the proper use of the term 'fiduciary duty' see *Bristol and West Building Society v Mothew (t/a Stapley & Co)*[1998] Ch 1 at 16, [1996] 4 All ER 698 at 710, CA, per Millett LJ (the expression is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties). The distinguishing obligation of a fiduciary is the obligation of loyalty see PARA 954 note 1 ante. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty: *Bristol and West Building Society v Mothew (t/a Stapley & Co)* supra at 18 and 712.

Breach of non-fiduciary duties will be covered by the appropriate limitation period under the Limitation Act 1980 (eg breaches of contract are covered by s 5): see *PARAGON Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400, CA, at 415-416 (disapproving *Nelson v Rye*[1996] 2 All ER 186, [1996] 1 WLR 1378); *Coulthard v Disco Mix Club Ltd*[1999] 2 All ER 457, [1999] All ER (D) 212; *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)*[2000] 2 All ER (Comm) 787, [2001] 1 WLR 112; *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)*[2003] EWCA Civ 1048, [2004] 1 BCLC 131.

4 The same distinction that exists in relation to trustees (see note 1 ante) exists in relation to fiduciaries: *PARAGON Finance plc v DB Thakerar & Co (a firm)*[1999] 1 All ER 400 at 414, CA, per Millett LJ (there is a distinction between those whose fiduciary obligations preceded the acts complained of and those whose liability in equity was occasioned by the acts of which complaint was made). See also *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)*[2003] EWCA Civ 1048 at [89], [2004] 1 BCLC 131 at [89] per Mummery LJ. As to whether the Limitation Act 1980 s 21(1)(a) (see the text and notes 1-2 supra) applies in relation to dishonest assistance claims see *Cattley v Pollard*[2006] EWHC 3130 (Ch), [2007] WTLR 245, [2006] All ER (D) 106 (Dec).

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(2) EXEMPTION AND RELIEFS/(v) Lapse of Time/1125. Trustee in possession of trust property.

## 1125. Trustee in possession of trust property.

No statutory period of limitation applies to a claim by a beneficiary under a trust to recover from the trustee<sup>1</sup> trust property or the proceeds of it in the possession of the trustee, or previously received by the trustee and converted to his use<sup>2</sup>.

Where, however, a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of the trust property under the trust, then in any proceedings brought<sup>3</sup> to recover that property or its proceeds after the expiration of the statutory limitation period<sup>4</sup> his liability is limited to the excess over his proper share provided that the trustee acted honestly and reasonably in making the distribution<sup>5</sup>.

1 For meaning of 'trust' and 'trustee' see the Trustee Act 1925 s 68 para (17); and PARA 601 note 3 ante (applied by virtue of the Limitation Act 1980 s 38). A person who holds as a constructive trustee within Millett LJ's first category will be a trustee for this purpose: see *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162.

2 See the Limitation Act 1980 s 21(1)(b); and LIMITATION PERIODS vol 68 (2008) PARA 1140. Accordingly the trustees could not rely on the defence of limitation in *Wassell v Leggatt* [1896] 1 Ch 554; *Re Sharp* [1906] 1 Ch 793; *Re Eyre-Williams* [1923] 2 Ch 533; *Re Howlett, Howlett v Howlett* [1949] Ch 767, [1949] 2 All ER 490 (all decided under earlier legislation). Earlier legislation replaced by the Limitation Act 1980 s 21(1)(b) was held not to apply so that the trustees could rely on the statutory provisions in *Re Page* [1893] 1 Ch 304; *Re Gurney* [1893] 1 Ch 590; *Re Timmis* [1902] 1 Ch 176; *Re Tufnell* (1902) 18 TLR 705; *Re Fountaine* [1909] 2 Ch 382, CA. In relation to current legislation see *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 at [39], [2002] 1 BCLC 162 at [39] per Chadwick LJ (in the context of a claim against a director who through an abuse of the trust and confidence reposed in him as a director had taken a transfer of the company's property to himself; the company was treated as 'the beneficiary' and the director as 'the trustee' for the purposes of s 21(1)(b)); *Newgate Stud Co v Penfold* [2005] EWHC 1015 (Ch), [2005] All ER (D) 376 (May); *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131; *Halton International Inc v Guernroy* [2006] EWCA Civ 801, [2006] WTLR 1241 (emphasising the need for actual property as opposed to voting rights).

3 le by virtue of the Limitation Act 1980 s 21(1)(b): see the text and note 2 supra.

4 le prescribed by the Limitation Act 1980 for proceedings to recover trust property: see PARA 1126 post.

5 See *ibid* s 21(2); and LIMITATION PERIODS vol 68 (2008) PARA 1140.

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## 1126. Standard limitation period.

Except in certain special cases<sup>1</sup>, the mere fact that property is trust property does not prevent a trustee from pleading a limitation defence<sup>2</sup>. A claim by a beneficiary to recover trust property or in respect of a breach of trust, not being a claim for which a period of limitation is otherwise prescribed, cannot be brought after the expiry of six years from the date on which the right of action accrued<sup>3</sup>. However, a right of action is not deemed to have accrued to a beneficiary entitled to a future interest for this purpose until his interest falls into possession<sup>4</sup>.

No beneficiary whose own claim has been barred can derive any benefit from a judgment or order obtained by any other beneficiary<sup>5</sup>. Where an action is based on fraud or mistake or there has been deliberate concealment or relevant facts have been concealed by the defendant, time does not start to run until the claimant has discovered the fraud, mistake or concealment or could with reasonable diligence have discovered it<sup>6</sup>.

The view that breach of the self-dealing and fair-dealing rules were not subject to the six year limitation period<sup>7</sup> is no longer regarded as correct<sup>8</sup>.

1 See the Limitation Act 1980 s 21(1)(a), (b); and PARAS 1124-1125 ante.

2 For meaning of trust and trustee and the application of the Limitation Act 1980 to constructive trusts see PARA 1124 note 1 ante. A fiduciary who is a constructive trustee in Millett LJ's first sense will be subject to the standard limitation period unless one of the exceptions contained in the Limitation Act 1980 s 21 (see PARAS 1124-1125 ante) applies.

3 See *ibid* s 21(3). There is a different period for personal representatives (see s 22); however, once the administration of the estate is complete a personal representative who continues to hold assets as a trustee will be subject to the limitation period applying to trustees, not personal representatives (see *Davies v Sharples* [2006] WTLR 839, Ch). See also *Cattley v Pollard* [2006] EWHC 3130 (Ch), [2007] WTLR 245, [2006] All ER (D) 106 (Dec).

4 See the Limitation Act 1980 s 21(3). Cf LIMITATION PERIODS vol 68 (2008) PARA 1143 et seq. Section 21(3) has no application to proceedings brought by the Attorney General to enforce a charitable trust for the benefit of the public at large: *A-G v Cocke* [1988] Ch 414, [1988] 2 All ER 391. A purported advance of capital in favour of a beneficiary does not amount to a falling into possession of the beneficiary's interest to the extent of the advance if the advance was a breach of trust and invalid: see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA (where the beneficiaries were seeking to recover the amount of the invalid advances from the trustees). A beneficiary with a contingent interest but in relation to whom the trustees have power to apply income or advance capital has only a future interest: *Armitage v Nurse* [1998] Ch 241 at 261, [1997] 2 All ER 705 at 719-720, CA.

5 See the Limitation Act 1980 s 21(4); and LIMITATION PERIODS vol 68 (2008) PARA 1145. Thus if a trust fund is lost, and the claim of the tenant for life is barred, the trustees, if compelled to replace the trust fund by the remainderman, will be personally entitled to the income so long as the life interest subsists: *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231, CA.

6 Limitation Act 1980 s 32(1). See LIMITATION PERIODS vol 68 (2008) PARA 1220. See *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1994] 4 All ER 481, [1994] 1 WLR 754, CA; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Fea v Roberts* [2005] EWHC 2186 (Ch), [2006] WTLR 255, Ch; *Davies v Sharples* [2006] WTLR 839.

By the Limitation Act 1980 s 32(2) (see LIMITATION PERIODS vol 68 (2008) PARA 1226) deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach: see *Liverpool Roman Catholic Archdiocese Trustees Inc v Goldberg* [2001] 1 All ER 182, (2000) Times, 18 July.



7 *Tito v Waddell (No 2)*, *Tito v A-G* [1977] Ch 106 at 248-251, [1977] 3 All ER 129 at 247-250 per Sir Robert Megarry V-C. For the self-dealing rule see PARA 938 ante; and for the fair-dealing rule see PARA 946 ante.

8 *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 at 160 per Mummery LJ.

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### **1127. Limitation period applied by analogy.**

Claims for breach of fiduciary duty<sup>1</sup> are not mentioned in the Limitation Act 1980. Such claims may amount to claims for breach of trust<sup>2</sup> in which case they will be subject to the provisions of the Limitation Act 1980 relevant to trustees<sup>3</sup>; or they may amount to actions for a personal obligation to account as a trustee<sup>4</sup> to which a limitation defence will be available by analogy<sup>5</sup> with common law claims<sup>6</sup>. No distinction will be made in point of limitation between an action for damages at common law and its counterpart in equity based on the same facts<sup>7</sup>.

1 For the correct use of the term 'fiduciary duty' see PARA 1124 note 3 ante.

2 See PARA 1124 note 4 ante.

3 In the Limitation Act 1980 ss 21, 22: see PARAS 1124-1126 ante.

4 See PARA 1124 note 1 ante.

5 See the Limitation Act 1980 s 36(1), which allows the court to apply a limitation period in claims for equitable relief in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1 July 1939; and LIMITATION PERIODS vol 68 (2008) PARA 919. As to the circumstances in which the court will so act see *Knox v Gye* (1872) LR 5 HL 656 at 674 per Lord Westbury. See also *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [1999] All ER (D) 212; *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112, CA; *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131.

6 A claim to equitable damages or compensation is a claim to equitable relief see *Cia de Seguros Imperio (a body corporate) v Heath (REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787 at 795, [2001] 1 WLR 112 at 119, CA, per Waller LJ. See also *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048 at [89], [2004] 1 BCLC 131 at [89] per Mummery LJ; *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 415-416, CA, per Millett LJ (disapproving *Nelson v Rye* [1996] 2 All ER 186, [1996] 1 WLR 1378); *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [1999] All ER (D) 212.

7 *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [1999] All ER (D) 212.

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## 1128. Laches.

Even though under the Limitation Act 1980 no period of limitation is applicable, proceedings against a trustee for breach of trust may be barred by the laches of the beneficiary, where that laches amounts to acquiescence or has caused the trustee to alter his position to his detriment<sup>1</sup>. The modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases. A broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights<sup>2</sup>. Mere delay is never a bar in itself to equitable relief. It must be coupled with circumstances which make it inequitable to enforce the claim<sup>3</sup>.

1 See *John v James* [1991] FSR 397; and EQUITY vol 16(2) (Reissue) PARA 914 et seq. Laches in the sense of a mere delay in taking proceedings does not operate as a defence where there is a statutory limitation period applicable which has not run: see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1964] Ch 303, [1963] 3 All ER 1, CA; *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048 at [139]-[141], [2004] 1 BCLC 131 at [139]-[141] per Mummery LJ; and EQUITY vol 16(2) (Reissue) PARA 910. See also *Re Loftus, Green v Gaul* [2006] EWCA Civ 1124, [2006] 4 All ER 1110, [2007] 1 WLR 591 (defence of laches not excluded by the Limitation Act 1980 s 21(1)(b) (see PARA 1125 ante)).

2 *Frawley v Neill* (1999) Times, 5 April, CA.

3 *Lindsay Petroleum Co v Hurd* (1874) 5 LR PC 221, PC; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853; *Johnson v EBS Pensioner Trustees Ltd* [2001] All ER (D) 90 (Mar).

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### **(3) CONTRIBUTION AND INDEMNITY**

#### **(i) Contribution and Indemnity by Co-trustees**

##### **1129. Contribution between trustees.**

As trustees who have acted together in breach of trust are jointly and severally liable<sup>1</sup>, a trustee who pays more than his quota of the loss is generally, but not always<sup>2</sup>, entitled to contribution in respect of their quota of it from his co-trustees or their representatives<sup>3</sup>; and he has the same rights against them as the beneficiary had to whom he has made good the loss<sup>4</sup>. Independently of any claim by a beneficiary, one of several trustees who commits a breach of trust may be required by the others to make it good<sup>5</sup>.

Where one of the trustees is also a beneficiary, he must bear the loss and indemnify his co-trustees to the full extent of his share in the trust estate, and may only claim contribution from them in respect of the amount, if any, by which the loss exceeds the value of his share<sup>6</sup>. However, a new trustee who is also a beneficiary, although he may be liable to the other beneficiaries for failure to have an existing breach of trust put right on his appointment, is not so liable to indemnify the original trustees but is himself entitled to be indemnified by the original trustees who were also responsible for the breach which was the primary cause of the loss<sup>7</sup>.

Where one of the trustees obtains and uses trust property, such as money, for his personal benefit in a breach of trust in which the others took no active part, he is liable for any loss resulting from that breach and must indemnify his co-trustees against that loss<sup>8</sup>.

Where one of the trustees is a solicitor controlling the administration of the trust and the other trustees are swayed by his advice to acquiesce in a breach of trust, he must indemnify his co-trustees against loss resulting from the breach<sup>9</sup>.

1 See *A-G v Daugars* (1864) 33 Beav 621 at 624 per Romilly MR; and PARA 1086 ante.

2 See PARA 1130 post.

3 See eg *Lingard v Bromley* (1812) 1 Ves & B 114; *Jesse v Bennett* (1856) 6 De GM & G 609; *Prince v Hine* (No 2) (1859) 27 Beav 345; *Birks v Micklethwait* (1864) 33 Beav 409 at 411 per Romilly MR (but see *Micklethwait v Winstanley* (1864) 5 New Rep 204); *Fletcher v Green* (1864) 33 Beav 426 at 430; *A-G v Daugars* (1864) 33 Beav 621 at 624; *Re Eyton, Bartlett v Charles* (1890) 45 ChD 458; *Chillingworth v Chambers* [1896] 1 Ch 685, CA; *Moxham v Grant* [1900] 1 QB 88 at 92, CA, per AL Smith LJ; *Jackson v Dickinson* [1903] 1 Ch 947. Where the breach of trust gave rise to a specialty debt (see PARA 1089 ante), the liability to contribute constitutes a specialty debt from the co-trustees liable to contribute: see the Mercantile Law Amendment Act 1856 s 5; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1165, 1177, 1257.

4 *Birks v Micklethwait* (1864) 33 Beav 409 at 411-412.

5 *Powlet v Herbert* (1791) 1 Ves 297; *Franco v Franco* (1796) 3 Ves 75; *Baynard v Woolley* (1855) 20 Beav 583.

6 *Chillingworth v Chambers* [1896] 1 Ch 685 at 698, CA, per Lindley LJ. See also *Seifert v Pensions Ombudsman* [1997] 1 All ER 214; revsd [1997] 4 All ER 947, CA. In *Moxham v Grant* [1900] 1 QB 88, CA (considered in *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531) the court

considered that the principle of equitable contribution as between delinquent trustees could apply as between company directors and shareholders who had received unlawful dividends with notice of the facts. See also PARA 1091 ante.

7 *Re Fountaine, Re Dowler, Fountaine v Lord Amherst*, not reported on this point in [1909] 2 Ch 382, CA, but cited in Underhill and Hayton *Law relating to Trusts and Trustees* (17th Edn, 2007) p 1158.

8 *Warwick v Richardson* (1842) 10 M & W 284; *Gray v Addison* (1856) 2 Jur NS 662; *Butler v Butler* (1877) 7 ChD 116 at 121, CA; *Bahin v Hughes* (1886) 31 ChD 390 at 395-396, CA, per Cotton LJ; *Wynne v Tempest* [1897] 1 Ch 110.

9 *Lockhart v Reilly* (1856) 25 LJ Ch 697; *Re Partington, Partington v Allen* (1887) 57 LT 654; *Re Turner, Barker v Ivimey* [1897] 1 Ch 536; *Re Linsley, Cattley v West* [1904] 2 Ch 785. However, a solicitor-trustee will not, merely because he is a solicitor, be made to indemnify a co-trustee in respect of a breach of trust in which the co-trustee participated actively and not merely in consequence of the advice and control of the solicitor: *Head v Gould* [1898] 2 Ch 250.

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### 1130. Statutory right to contribution.

The Civil Liability (Contribution) Act 1978 creates a statutory right to contribution in the discretion of the court which supersedes the equitable right to contribution as distinct from indemnity<sup>1</sup>. The Act does not apply to losses occurring before 1 January 1979<sup>2</sup> or to breaches of an obligation assumed by a person before that date<sup>3</sup>. Any person liable in respect of any damage suffered by another may recover contribution<sup>4</sup> from any other person liable for the same damage<sup>5</sup>. In proceedings for contribution<sup>6</sup> the court is given power to award in favour of one person against another contribution of such amount as is found to be just and equitable, having regard to the extent of the responsibility of that other for the loss<sup>7</sup>. The court may exempt any person from liability to make contribution or direct that the contribution to be recovered from any person is to amount to a complete indemnity<sup>8</sup>. The right of action for contribution becomes statute barred after the expiration of two years from the date on which it accrued<sup>9</sup>. The right accrues on the date of the judgment against a trustee for breach of trust<sup>10</sup> or on the date on which he and the beneficiaries reached a compromise agreement fixing the amount to be paid by him<sup>11</sup>.

1 See the Civil Liability (Contribution) Act 1978 s 7(3); and DAMAGES vol 12(1) (Reissue) PARA 837; TORT vol 45(2) (Reissue) PARA 349. For examples of indemnity see PARA 1129 ante.

2 See *ibid* ss 7(1), 10(2); and DAMAGES vol 12(1) (Reissue) PARA 837; TORT vol 45(2) (Reissue) PARA 349.

3 *Ibid* s 7(2); and TORT vol 45(2) (Reissue) PARA 349.

4 A person is liable in respect of damage if the person who suffered it is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise): *ibid* s 6(1).

5 *Ibid* s 1(1). The contribution principle is limited to liability for 'the same damage' and the phrase must be given its natural and ordinary meaning: *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14 at [27], [2002] 2 All ER 801 at [27], [2002] 1 WLR 1397 at [27] per Lord Steyn. In *Friends Provident Life Office v Hillier, Parker, May and Rowden* [1997] QB 85, [1995] 4 All ER 260, CA (followed in *Hurstwood Developments Ltd v Motor and General and Andersley & Co Insurance Services Ltd (HB Boring & Co Ltd (Pt 20 defendants))* [2001] EWCA Civ 1785, [2002] Lloyd's Rep IR 185), the court applied a broad and purposive interpretation holding that a restitutionary claim for repayment of money paid under a mistake was a claim for damage suffered and so within the Act. Lord Steyn in *Royal Brompton NHS Trust v Hammond* *supra* at [33] held that a restitutionary claim cannot be said to be a claim to recover compensation within the meaning of the Civil Liability (Contribution) Act 1978 s 1(1) and, to that extent *Friends Provident Life Office v Hillier, Parker, May and Rowden* *supra* was wrong. But see *Charter plc v City Index Ltd (Gawler, Pt 20 defendants)* [2006] EWHC 2508 (Ch), [2007] 1 All ER 1049, [2006] All ER (D) 145 (Oct), where Sir Andrew Morritt C described Lord Steyn's comments as obiter and held that he was bound to follow *Friends Provident Life Office v Hillier, Parker, May and Rowden* *supra*. The same approach was taken in *Niru Battery Manufacturing Co v Milestone Trading Co Ltd (No 2)* [2004] EWCA Civ 487 at [74]-[78], [2004] 2 All ER (Comm) 289 at [74]-[78] per Clarke LJ.

6 In proceedings under the Civil Liability (Contribution) Act 1978 s 1: see DAMAGES vol 12(1) (Reissue) PARA 839 *et seq*; TORT vol 45(2) (Reissue) PARA 349 *et seq*.

7 See *ibid* s 2(1); and DAMAGES vol 12(1) (Reissue) PARA 844; TORT vol 45(2) (Reissue) PARA 352.

8 See *ibid* s 2(2); and DAMAGES vol 12(1) (Reissue) PARA 844; TORT vol 45(2) (Reissue) PARA 352. The object of contribution proceedings under the Civil Liability (Contribution) Act 1978 is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the claimant, regardless of where that cost has fallen in the first instance: *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48

at [52], [2003] 2 AC 366 at [52], [2003] 1 All ER 97 at [52] per Lord Nicholls of Birkenhead. In a case of vicarious liability the employer stands in the shoes of the wrongdoer employee: see *Mara v Brown* [1896] 1 Ch 199, where the Court of Appeal held that a firm of solicitors will not be vicariously liable for loss caused by a solicitor acting as an express or constructive trustee (using the term 'constructive trustee' to describe someone who has taken upon himself the custody and administration of property on behalf of others (and who, therefore, falls into the first category set out by Millett LJ in *PARAGON Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408-409, CA: see PARA 1124 ante) since acting as such was not within his implied authority. However, in *Dubai Aluminium Company Ltd v Salaam* supra at [141]-[143] Millett LJ held that a firm will be vicariously liable for loss caused by conduct of a solicitor who does not deal with property on behalf of others but who receives it adversely to the claimant and as a result becomes liable to account as a trustee (falling into the second category set out by Millett LJ in *PARAGON Finance plc v DB Thakerar & Co (a firm)* supra: see PARA 1124 ante) and the application of *Mara v Brown* supra in *Re Bell's Indenture, Bell v Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217 was held to be incorrect.

9 See the Limitation Act 1980 s 10(1); and LIMITATION PERIODS vol 68 (2008) PARA 1006.

10 See *ibid* s 10(3); and LIMITATION PERIODS vol 68 (2008) PARA 1007.

11 See *ibid* s 10(4); and LIMITATION PERIODS vol 68 (2008) PARA 1007.

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## (ii) Indemnity from Beneficiaries; Recoupment

### 1131. Impounding of interest.

Where a trustee<sup>1</sup> commits a breach of trust<sup>2</sup> at the instigation or request<sup>3</sup>, or with the consent in writing, of a beneficiary<sup>4</sup>, the court<sup>5</sup>, if it thinks fit<sup>6</sup>, may make such order as to it seems just for impounding all or any part of the beneficiary's interest in the trust estate<sup>7</sup> by way of indemnity<sup>8</sup> to the trustee<sup>9</sup> or persons claiming through him<sup>10</sup>.

1 For the meaning of 'trustee' see PARA 601 ante. See also *Mara v Browne*[1895] 2 Ch 69 at 94.

2 The act or omission instigated or requested must itself be a breach of trust, and not merely an act or omission which becomes a breach of trust by reason of want of care on the trustees' part: *Re Somerset, Somerset v Earl Poulett*[1894] 1 Ch 231 at 265, CA, per Lindley LJ.

3 The instigation or request need not be in writing: *Griffith v Hughes*[1892] 3 Ch 105; *Mara v Browne*[1895] 2 Ch 69 at 92.

4 The beneficiary must know what he is instigating or requesting or consenting to: *Re Somerset, Somerset v Earl Poulett*[1894] 1 Ch 231 at 270, 274, CA.

5 For the meaning of 'the court' see PARA 632 note 3 ante.

6 See *Ricketts v Ricketts* (1891) 64 LT 263 at 265; *Griffith v Hughes*[1892] 3 Ch 105 at 107; *Re Somerset, Somerset v Earl Poulett*[1894] 1 Ch 231 at 274, CA; *Bolton v Curre*[1895] 1 Ch 544.

7 See *Booth v Booth* (1838) 1 Beav 125; *Lincoln v Wright* (1841) 4 Beav 427 at 432; *Bentley v Robinson* (1859) 9 I Ch R 479. The interest must be in the actual estate of which the trustee seeking to impound is trustee: *Ricketts v Ricketts* (1891) 64 LT 263 at 265. The power applies where the beneficiary is one of the trustees: *Chillingworth v Chambers*[1896] 1 Ch 685, CA. The beneficiary's interest may be impounded as against a person to whom it has been assigned subsequently to the breach of trust (*Bolton v Curre*[1895] 1 Ch 544 at 548-549), and as against the beneficiary's trustee in bankruptcy (*Fletcher v Collis*[1905] 2 Ch 24 at 39, CA).

8 A trustee does not waive his right to the indemnity by declining to take a mortgage of the beneficiary's interest as security for the breach of trust at the time of its commission: *Bolton v Curre*[1895] 1 Ch 544 at 549-550.

9 An order for an indemnity may be made in favour of a former trustee, as the right does not depend upon the claimant having possession of the trust fund: *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co (No 2)*[1963] Ch 576, [1963] 1 All ER 857.

10 Trustee Act 1925 s 62(1) (amended by the Married Women (Restraint upon Anticipation) Act 1949 s 1(4), Sch 2). The Trustee Act 1925 s 62 (as amended) applies to breaches of trust whenever committed: see s 62(2). It replaces enactments which sanctioned and extended the jurisdiction in those cases which had been previously exercised by courts of equity (*Trafford v Boehm* (1746) 3 Atk 440 at 444 per Lord Hardwicke LC; *Raby v Ridehalgh* (1855) 7 De GM & G 104; *Sawyer v Sawyer*(1885) 28 ChD 595 at 598, CA, per Chitty JJ), but had not curtailed the previously existing rights and remedies of trustees, or altered the law or the principles on which it is to be administered, except by giving greater power to the court (*Re Somerset, Somerset v Earl Poulett*[1894] 1 Ch 231 at 275, CA, per Davey LJ; *Bolton v Curre*[1895] 1 Ch 544 at 549 per Romer J; *Fletcher v Collis*[1905] 2 Ch 24 at 34-35, CA, per Romer LJ).



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(3) CONTRIBUTION AND INDEMNITY/(ii) Indemnity from Beneficiaries; Recoupment/1132. Procuring breach of trust.

### **1132. Procuring breach of trust.**

Where one of several beneficiaries procures trust money to be improperly laid out or to be paid away under a fraudulent appointment by him, or otherwise himself commits a breach of the terms of the trust, and part of the trust estate is consequently lost, the other beneficiaries are entitled as against him to have their shares made good out of his share of what is ultimately recovered<sup>1</sup>, or out of any benefit which he has himself derived from the breach of trust<sup>2</sup>. A beneficiary who induces a trustee to commit a breach of trust is primarily liable for it, and will be ordered to recoup to the trustee the amount which the trustee has been required to make good to the trust estate<sup>3</sup>.

1 *Phillipson v Gatty, Gatty v Phillipson* (1850) 2 H & Tw 459. As to the position where the beneficiary is also trustee see PARAS 1091, 1129 ante. The other beneficiaries have no claim on the beneficiary's share in a fund held under another trust: *Edgar v Plomley* [1900] AC 431, PC.

2 *Greenwood v Wakeford* (1839) 1 Beav 576; *Williams v Allen (No 2)* (1863) 32 Beav 650; *Re Deane, Bridger v Deane* (1889) 42 ChD 9, CA.

3 *Trafford v Boehm* (1746) 3 Atk 440 at 444; *Keays v Lane* (1869) IR 3 Eq 1.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(3) CONTRIBUTION AND INDEMNITY/(ii) Indemnity from Beneficiaries; Recoupment/1133. Overpayment.

### 1133. Overpayment.

Where a beneficiary receives from the trustee more than he is entitled to, whether in respect of capital or income, he may be liable to refund to the trust estate the excess which ought not to have been paid to him<sup>1</sup>. So far as it is capable of being identified or disentangled, money or property wrongly paid or transferred to a beneficiary or the money or property into which it has been converted may be followed and recovered, unless it has come into the hands of a purchaser for valuable consideration without notice of the trust<sup>2</sup>. Where possible, the court corrects errors of account between a trustee and a beneficiary, and, if the administration is out of court, directs the appropriate adjustment<sup>3</sup>. In administering the estate the court will cause the amount wrongly paid to the beneficiary in respect of one interest to be deducted from any other shares in the estate to which he is entitled<sup>4</sup>. A trustee who overpays a beneficiary can thus adjust accounts by retaining the overpayments out of other interests of the beneficiary, such as future income as it arises<sup>5</sup>. It seems, however, that a trustee who is also a beneficiary is not entitled to recover from the other beneficiaries amounts which he has overpaid to them in excess of their share<sup>6</sup>.

In the administration of the estate of a deceased person an unpaid or underpaid creditor, legatee or next of kin may bring a direct claim in equity against the person to whom the estate has been wrongfully distributed<sup>7</sup>. It is uncertain whether this direct claim in equity lies in similar circumstances in the execution of a trust as opposed to the administration of the estate of a deceased person<sup>8</sup>. There is no reported English case where a trustee has directly recovered from an overpaid beneficiary and it has generally been assumed that he cannot do so. However, it would appear that a claim could now perhaps be made by an application of the law of restitution based on the principle of unjust enrichment, under which, it is submitted, as between trustees and a person who is wrongly paid, the trustees may have a right to recover the payment if it was paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution such as the defence of change of position<sup>9</sup>.

1 *Brooksbank v Smith* (1836) 2 Y & C Ex 58; *Fuller v Knight* (1843) 6 Beav 205 at 210; *M'Gachen v Dew, Dew v M'Gachen* (1851) 15 Beav 84 at 90 per Romilly MR; *Baynard v Woolley, Wearing v Baynard* (1855) 20 Beav 583; *Re Smith's Estate, Clifford v Washington* (1879) 48 LJ Ch 205; *Re Brown, Dixon v Brown* (1886) 32 ChD 597; *Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502 at 513 per Warrington J.

2 See eg *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. See also PARA 1134 ante; and EQUITY vol 16(2) (Reissue) PARA 861 et seq.

3 *Re Musgrave, Machell v Parry* [1916] 2 Ch 417 (following *Re Ainsworth, Finch v Smith* [1915] 2 Ch 96). An honest mistake of law, not being a mistake of public law, does not exclude this relief: *Re Musgrave, Machell v Parry* supra. See also *Re Wooldridge, Wooldridge v Coe* [1920] WN 78. See further MISTAKE vol 77 (2010) PARAS 9-10.

4 *Dibbs v Goren* (1849) 11 Beav 483; *Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502. It makes no difference that the other shares have been assigned for a valuable consideration: *Dibbs v Goren* supra; *Re Brown, Dixon v Brown* (1886) 32 ChD 597.

5 *Livesey v Livesey* (1827) 3 Russ 287; *Re Musgrave, Machell v Parry* [1916] 2 Ch 417; *Re Reading, Edmonds v Reading* [1916] WN 262.

6 *Re Horne, Wilson v Cox Sinclair* [1905] 1 Ch 76. However, this case has been criticised and held to lay down no rule of general application: see *Re Ainsworth, Finch v Smith* [1915] 2 Ch 96; *Re Reading, Edmonds v Reading* (1916) 60 Sol Jo 655. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 516 et seq.

7 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. See also EQUITY vol 16(2) (Reissue) PARA 865.

8 See *Ministry of Health v Simpson* [1951] AC 251 at 265-266, [1950] 2 All ER 1137 at 1140, HL, per Lord Simonds; but see also *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 3 All ER 540, [1958] 1 WLR 1216, CA; *Eddis v Chichester Constable* [1969] 1 All ER 546, [1969] 1 WLR 385 (affd without reference to this point [1969] 2 Ch 345, [1969] 2 All ER 912, CA); *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401; *Re J Leslie Engineers Co Ltd* [1976] 2 All ER 85, [1976] 1 WLR 292.

9 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nuridin and Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL. As to the defences available in the law of restitution see RESTITUTION vol 40(1) (2007 Reissue) PARA 165 et seq; and as to the defence of change of position see RESTITUTION vol 40(1) (2007 Reissue) PARAS 166-169.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(4) IDENTIFYING AND CLAIMING TRUST PROPERTY/1134. Following and tracing trust property in general.

## **(4) IDENTIFYING AND CLAIMING TRUST PROPERTY**

### **1134. Following and tracing trust property in general.**

The processes of following and tracing are distinct, though the distinction has not always been made. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner, though he cannot, of course, recover twice. In practice his choice is often dictated by circumstances<sup>1</sup>. A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value of the legal estate without notice or a person who claims through such a purchaser<sup>2</sup>.

The successful completion of a tracing exercise may be preliminary to a personal claim or a proprietary one, to the enforcement of a legal right or an equitable one<sup>3</sup>. The right is not restricted to tangible assets, but applies equally to a thing in action<sup>4</sup>.

Notwithstanding criticism of the current state of the law<sup>5</sup> it remains a prerequisite of the right to trace in equity that there must be a fiduciary relationship which calls the equitable jurisdiction into being<sup>6</sup>. In the case of beneficiaries tracing misappropriated trust property, whether into the hands of the trustee or a third party, the requirement for a fiduciary relationship will always be satisfied<sup>7</sup>. The requirement is also satisfied in relation to unauthorised profits which are held on constructive trust<sup>8</sup>. In cases of commercial fraud the embezzlement of a company's funds almost invariably involves a breach of fiduciary duty on the part of the company's employees or agents; furthermore, there is no requirement for an initial fiduciary relationship since the payment to the defendant itself gives rise to a fiduciary relationship<sup>9</sup>. It has been held that money paid as a result of a mistake of fact is traceable in equity because the payer retains an equitable property interest in it and the payee is subjected to a fiduciary duty to respect that interest<sup>10</sup>. Where money is obtained by fraud otherwise than under a legally enforceable contract no beneficial interest passes to the fraudster thereby enabling the claimant to trace in equity<sup>11</sup>. Money paid under a void contract is not subject to a resulting trust so as to give rise to a right to trace in equity<sup>12</sup>. Upon rescission of a contract for fraudulent misrepresentation the beneficial title which passed to the representor under the contract revests in the representee, at least to the extent necessary to support an equitable tracing claim<sup>13</sup>. In the case of non-contractual payments made out of a company's funds in breach of fiduciary duty, it is irrelevant whether the payments are void or voidable; equitable tracing is available on the basis of constructive trust against a defendant who has received notice of the company's claim<sup>14</sup>.

1 *Foskett v McKeown*[2001] 1 AC 102 at 127, [2000] 3 All ER 97 at 120, HL, per Lord Millett.

2 *Foskett v McKeown*[2001] 1 AC 102 at 108-109, [2000] 3 All ER 97 at 102, HL, per Lord Browne-Wilkinson. In this case at 127-130 and 119-122, Lord Millett refers simply to a bona fide purchaser for value without notice, but this may well be shorthand for the rule as stated by Lord Browne-Wilkinson. See also *Re Diplock, Diplock v Wintle*[1948] Ch 465 at 540, [1948] 2 All ER 318 at 357, CA (affd sub nom *Ministry of Health v Simpson*[1951] AC 251, [1950] 2 All ER 1137, HL); and EQUITY vol 16(2) (Reissue) PARA 861 et seq. Interim orders for disclosure

may be made to assist in establishing a claim to trace or follow trust property: *Banker's Trust Co v Shapira*[1980] 3 All ER 353, [1980] 1 WLR 1274, CA. It may be provided by or under statute that trust property is to be transferred free of any trust: see eg the National Insurance and Civil Service (Superannuation) Rules 1948, SI 1948/2434, r 1; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 584. As to the liability of the bank in relation to dealings with trust money see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 843, 844. The transmission of a claimant's property rights from one asset to another is part of the law of property, not of the law of unjust enrichment; the claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Cf *Boscawen v Bajwa*[1995] 4 All ER 769 at 776, [1996] 1 WLR 328 at 334, CA, per Millett LJ. As to unjust enrichment see further RESTITUTION vol 40(1) (2007 Reissue) PARA 10 et seq.

3 See *Foskett v McKeown*[2001] 1 AC 102 at 128, [2000] 3 All ER 97 at 120-121, HL, per Lord Millett. An equitable proprietary claim will generally be made by a person who claims beneficial ownership; but see *Bracken Partners Ltd v Gutteridge* [2003] EWCA Civ 1875, [2004] 1 BCLC 377 (a person who is personally liable for the equitable wrongs of dishonest participation in breaches of fiduciary duty and thereby accountable in equity to the beneficial owner has a sufficient interest to bring proceedings to trace assets into the hands of another wrongful recipient).

4 *Agip (Africa) Ltd v Jackson*[1990] Ch 265, [1992] 4 All ER 385 (affd [1991] Ch 547, [1992] 4 All ER 451, CA); *Lipkin Gorman (a firm) v Karpnale Ltd*[1991] 2 AC 548, [1992] 4 All ER 512, HL; *Trustees of the Property of FC Jones & Sons (a firm) v Jones*[1997] Ch 159, [1996] 4 All ER 721, CA.

5 See *Bristol and West Building Society v Mothew (t/a Stapley & Co)*[1998] Ch 1 at 23, [1996] 4 All ER 698 at 716, CA, per Millett LJ; *Foskett v McKeown*[2001] 1 AC 102 at 128, [2000] 3 All ER 97 at 121, HL, per Lord Millett.

6 *Sinclair v Brougham*[1914] AC 398, 83 LJ Ch 465, HL (overruled on different grounds by *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, 2 All ER 961, HL); *Re Diplock*[1948] Ch 465, 2 All ER 318, CA. See also *Agip (Africa) Ltd v Jackson*[1991] Ch 547 at 566, [1992] 4 All ER 451 at 466, CA, per Fox LJ; *Boscawen v Bajwa* [1995] 4 All ER 769 at 777, [1996] 1 WLR 328 at 335, CA, per Millett LJ; *Jones FC & Sons v Jones*[1997] Ch 159, [1996] 4 All ER 721, CA (where the misappropriated money was traced at common law in the absence of any fiduciary relationship); *Foskett v McKeown*[2001] 1 AC 102 at 121, [2000] 3 All ER 97 at 128, HL, per Lord Millett; *Shalson v Russo*[2003] EWHC 1637 (Ch) at [104], [2005] Ch 281 at [104], [2005] 2 WLR 1213 at [104] per Rimer J; *Campden Hill Ltd v Chakrani*[2005] EWHC 911 (Ch) at [74], [2005] All ER (D) 238 (May) at [74] per Hart J ('the fiduciary relationship may arise either from a division of the legal and beneficial ownership in the monies sought to be traced or from the very nature of the relationship'). But see *Compagnie Noga D'Importation Et D'Exportation SA v Australia and New Zealand Banking Group Ltd (No 5)* [2005] EWHC 225 (Comm) at [16], [2005] All ER (D) 176 (Mar) at [16] per Langley J ('there are issues as to whether or not a fiduciary duty owed by the defendant to the claimant is in law an essential ingredient of a claim to trace').

7 See the text and note 1 supra.

8 *A-G for Hong Kong v Reid*[1994] 1 AC 324, [1994] 1 All ER 1, PC. See also *Daraydan Holdings v Solland International Ltd*[2004] EWHC 622 (Ch), [2005] Ch 119, [2005] 4 All ER 73. For a contrary view see *Lister v Stubbs*(1890) 45 Ch D 1; applied in *A-G's Reference (No 1 of 1985)*[1986] QB 491, [1986] 2 All ER 219.

9 See *Agip (Africa) Ltd v Jackson*[1990] Ch 265 at 290, [1992] 4 All ER 385 at 402 per Millett J; affd [1991] Ch 547, [1992] 4 All ER 451, CA.

10 *Chase Manhattan Bank NA v Israeli-British Bank (London) Ltd*[1981] Ch 105, [1979] 3 All ER 1025. However, see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715, [1996] 2 All ER 961 at 996, HL, where this reasoning was doubted by Lord Browne-Wilkinson who considered that the recipient did not become a trustee until learning of the mistake some two days after the receipt. See also *Papamichael v National Westminster Bank plc*[2002] 2 All ER (Comm) 60, [2002] 1 Lloyd's Rep 332.

11 *Halley v Law Society*[2003] EWCA Civ 97, 6 ITELR 40 (adopting the obiter analysis of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669 at 716, [1996] 2 All ER 961 at 997); applied in *Campden Hill Ltd v Chakrani*[2005] EWHC 911 (Ch), [2005] All ER (D) 238 (May). Lord Browne-Wilkinson's obiter dictum in the same passage of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* supra, that stolen moneys are traceable in equity on the basis that the thief holds on an immediate constructive trust for the victim, was doubted in *Shalson v Russo*[2003] EWHC 1637 (Ch) at [110], [2005] Ch 281 at [110], [2005] 2 WLR 1213 at [110] per Rimer J on the grounds that a thief ordinarily acquires no property in what he steals and the owner retains the legal and beneficial title.

12 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[1996] AC 669, [1996] 2 All ER 961, HL (overruling *Sinclair v Brougham* [1914] AC 398, 83 LJ Ch 465, HL).

13 *Shalson v Russo* [2003] EWHC 1637 (Ch) at [121]-[127], [2005] Ch 281 at [121]-[127], [2005] 2 WLR 1213 at [121]-[127] per Rimer J. See also *Small v Attwood* (1832) You 507 at 533-538 per Lord Lyndhurst; *Banque Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321, CA; *Lonrho Plc v Fayed (No 2)* [1991] 4 All ER 961 at 971-972, [1992] 1 WLR 1 at 11-12 per Millett J; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 734 per Millett J; *Bank Tejarat v Hong Kong and Shanghai Banking Corpn (CI) Ltd* [1995] 1 Lloyd's Rep 239 at 248 per Tuckley J; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 102-104, [1994] 2 All ER 806 at 825-827, PC (explained in *Shalson v Russo* supra at [126] per Rimer J).

14 *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, CA (director made unauthorised payment of company funds into his pension scheme).

## UPDATE

### 1134 Following and tracing trust property in general

NOTE 6--A claimant has no proprietary right to trace money which is paid into a companies account to settle its debts, in breach of its promise to hold the money on trust in a separate client account, as the breach of trust occurred before the money became part of the trust fund: *Re BA Peters plc (in administration); Moriarty v Atkinson* [2008] EWCA Civ 1604, [2010] 1 BCLC 142.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(4) IDENTIFYING AND CLAIMING TRUST PROPERTY/1135. Things in action.

### **1135. Things in action.**

It is commonly said that money can be traced through a bank account. Strictly, of course, an account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder<sup>1</sup>. The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim<sup>2</sup>. Instead, a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands. These consist of the debt or part of the debt due to him from the bank<sup>3</sup>. Similarly, premiums may be traced into an insurance policy, that is the bundle of rights to which the policyholder is entitled in return for the premiums. These rights together constitute a thing in action, and that thing in action represents the traceable proceeds of the premiums. When the policy matures, the insurance money represents the traceable proceeds of the policy and hence indirectly of the premiums<sup>4</sup>.

<sup>1</sup> *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75 at 76, [1986] 1 WLR 1072 at 1073, PC.

<sup>2</sup> But as to the position where the bank is on notice of the claimant's right to the money at the time of the payment in see *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [2005] 2 WLR 1213.

<sup>3</sup> *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL. See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

<sup>4</sup> *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(4) IDENTIFYING AND CLAIMING TRUST PROPERTY/1136. Clean substitutions.

### **1136. Clean substitutions.**

Where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit, the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund<sup>1</sup>.

<sup>1</sup> See *Foskett v McKeown* [2001] 1 AC 102 at 130, [2000] 3 All ER 97 at 122, HL, per Lord Millett.



Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(4) IDENTIFYING AND CLAIMING TRUST PROPERTY/1137. Mixed substitutions.

### **1137. Mixed substitutions.**

In the case of a mixed substitution, that is where a trustee wrongfully uses trust money to provide part only of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset. It is not necessary for the claimant to show in addition that his property has contributed to any increase in the value of the new asset. A beneficiary's right to claim a lien is, however, available only against a wrongdoer and those deriving title under him otherwise than for value. Innocent contributors must be treated equally between themselves<sup>1</sup>.

<sup>1</sup> See *Foskett v McKeown* [2001] 1 AC 102 at 130-132, [2000] 3 All ER 97 at 123-124, HL, per Lord Millett. See also *Re Tilley's Will Trusts*, *Burgin v Croad* [1967] Ch 1179, [1967] 2 All ER 303; and EQUITY vol 16(2) (Reissue) PARAS 861-866. As to the liability of a trustee who mixes trust money with his own money to pay interest see PARA 1106 post. Similar principles apply to following into physical mixtures. If a pro rata division is excluded, the beneficiary takes the whole, and there is no question of confining him to a lien: *Lupton v White*, *White v Lupton* (1808) 15 Ves 432; *Frith v Cartland* (1865) 2 Hem & M 417 at 420 per Page Wood V-C; *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680 at 695, HL, per Lord Moulton; *Jones v DeMarchant* (1916) 28 DLR 561; *Foskett v McKeown* supra. See also *Brinks Ltd v Abu-Saleh* [1995] 4 All ER 65, [1995] 1 WLR 1478, where it was said to be settled law that if a trustee mixes trust assets with his own in such a way that they cannot be sufficiently distinguished and treated separately, to the extent that it is not possible to distinguish them, they belong to the trust. The position is different for innocent volunteers: see *Re Diplock*, *Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA (where the proprietary claim was not available against an innocent volunteer who had expended trust money on the alteration and improvements of its own assets (with the result that the trust money could not be disentangled) on the grounds that it would work an injustice to allow it); affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/4. BREACH OF TRUST/(4) IDENTIFYING AND CLAIMING TRUST PROPERTY/1138. Tracing through bank accounts.

### 1138. Tracing through bank accounts.

Equity has developed rules of identification in relation to funds mixed in a bank account. Where a trustee mixes his own money<sup>1</sup> with trust money before spending some of the mixed fund, the beneficiary will be entitled to claim against the balance on the account on the basis that the trustee is presumed to spend his own money first<sup>2</sup>. If, however, the balance on the account is insufficient to meet the claim, the beneficiary may claim a lien over any asset bought out of the mixed fund<sup>3</sup>.

Tracing is impossible through an overdrawn account, whether an account already overdrawn at the time the relevant money was paid into it (except in so far as it exceeds the amount of the overdraft) or an account which was then in credit but subsequently became overdrawn<sup>4</sup>. In any case tracing is only possible to such an amount of the balance ultimately standing to the credit of the trustee as does not exceed the lowest balance of the account during the intervening period<sup>5</sup>.

1 The position is different where the money is mixed with that of another trust fund or other innocent volunteer: see *Re Clayton's Case, Baring v Noble* (1816) 1 Mer 572 (first in, first out rule); *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, CA (rule displaced where parties knew their funds were to be pooled); *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478 (rule displaced by even a slight counterweight).

2 *Re Hallett's Estate, Knatchbull v Hallett* (1879) 13 Ch 696.

3 *Re Oatway, Hertslet v Oatway* [1903] 2 Ch 356; *Re Tilley's Will Trusts, Burgin v Croad* [1967] Ch 1179 at 1185, [1967] 2 All ER 303 at 308. There is no direct authority as to whether the beneficiaries may claim against assets bought out of the mixed fund where there is a sufficient balance on the account to meet their claim.

4 *Bishopsgate Investment Management Ltd (in liquidation) v Homan* [1995] Ch 211, [1995] 1 All ER 347, CA. The consolidation of an overdrawn current account with deposit accounts in order to create a credit balance for the purpose of equitable tracing has been rejected: *Box v Barclays Bank* [1998] Lloyd's Rep 185; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [2005] 2 WLR 1213.

5 *Bishopsgate Investment Management Ltd (in liquidation) v Homan* [1995] Ch 211, [1995] 1 All ER 347, CA; *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62. As to the possibility of tracing into an asset acquired with money from an overdrawn account where misappropriation from a trust fund enables the borrowing for the acquisition to be repaid, sometimes called 'backward tracing', see *Bishopsgate Investment Management Ltd (in liquidation) v Homan* supra; *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* (23 July 1997, unreported); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [2005] 2 WLR 1213.

Halsbury's Laws of England/TRUSTS (VOLUME 48 (2007 REISSUE))/5. CONFLICT OF LAWS/1139. In general.

## **5. CONFLICT OF LAWS**

### **1139. In general.**

The Recognition of Trusts Act 1987 incorporates into the law of the United Kingdom the major provisions of the Convention on the law applicable to trusts and on their recognition<sup>1</sup>. The purpose of the convention is to establish common principles between states on the law of trusts and to deal with the most important issues concerning their recognition. Trusts are not in general a concept familiar to the civil law countries. Their systems are not designed to accept that one individual may hold assets on behalf of another. The Recognition of Trusts Act 1987 provides the machinery for identifying the law of which state is to govern any particular trust and provides rules for the recognition of that trust in accordance with that governing law. The Act involves little change to the substance of the existing law of the United Kingdom but it serves to clarify a number of issues where United Kingdom law has not yet been fully developed<sup>2</sup>.

1     ie the Convention on the law applicable to trusts and on their recognition (Cmnd 9494) adopted in draft form by the Hague Conference on Private International Law on 20 October 1984 and signed on behalf of the United Kingdom on 10 January 1986. The Convention is set out in the Schedule to the Recognition of Trusts Act 1987. As to the Recognition of Trusts Act 1987 see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 424 et seq.

2     See 482 HL Official Report (5th series), 4 December 1986, cols 939-940.